87-1369

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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RICHARD A. LAFORTE AND RICKEY A. ROGERS,
*Petitioners*

v.

CONSTANCE HORNER, DIRECTOR,
U.S. OFFICE OF PERSONNEL MANAGEMENT,
AND UNITED STATES OF AMERICA,
*Respondents*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

Do federal agencies violate the overtime pay provisions of the Fair Labor Standards Act by compensating firefighters for overtime work at half their regular rate of pay rather than one-and-one-half times that regular rate?

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

---

Petitioners, Richard A. LaForte and Rickey A. Rogers, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered November 17, 1987.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 833 F.2d 977 and is reprinted in the Appendix at p. 1a, *infra*. The order, judgment, and opinion of the United States District Court for the District of Maryland are not reported. They are reprinted in the Appendix at p. 30a, *infra*.

## JURISDICTION

The Court of Appeals issued its judgment affirming the judgment of the United States District Court for the District of Maryland on November 17, 1987. Petitioners' suggestion for rehearing *en banc* was denied on December 23, 1987. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Act of June 25, 1938, c. 676, § 7(a), (k), 52 Stat. 1063, as amended, 29 U.S.C. § 207(a), (k):

> (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.
>
> * * * *
>
> (k) No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—
>
> > (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the less of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6 (c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,
>
> compensation at a rate not less than one and one-half times the regular rate at which he is employed.

5 U.S.C. § 5504(b) (Supp. IV 1986); the bracketed portion indicates matter deleted by the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 15203, 100 Stat. 83, 334 (1986):

> [For pay computation purposes affecting an employee, the annual rate of basic pay established by or under statute is deemed payment for employment during 52 basic administrative workweeks of 40 hours.] When it is necessary for computation of pay under this subsection to convert an annual rate of basic pay to a basic hourly rate, the following rules govern: (1) to derive an hourly rate, divide the annual rate by 2,807 * * *.

## STATEMENT OF THE CASE

Petitioners, one a present and the other a former federally employed firefighter at Andrews Air Force Base, Maryland, sued the Director of the Office of Personnel Management and the United States in district court, seeking a declaratory judgment and backpay for overtime wages. They challenged, as contrary to the Fair Labor Standards Act (the Act), Federal Personnel Manual (FPM) Letter 551-5 (reprinted in the Appendix at p. 52a), which regulates the calculation of overtime pay for firefighters. The district court had jurisdiction pursuant to 29 U.S.C. § 216(b) and 28 U.S.C. § 1331.

Petitioners alleged that their overtime pay was less than that to which the Act entitles them, principally because the FPM Letter spreads their basic pay, on which their overtime premium is calculated, over a greater number of hours than 5 U.S.C. § 5504(b) permits. The district court, considering itself bound by the decision in *Zumerling v. Devine*, 769 F.2d 745 (Fed. Cir. 1985), entered judgment for respondents on cross-motions for summary judgment. The court of appeals, in a 2-to-1 decision, affirmed.

Unlike that of most federal workers, a firefighter's tour of duty consists of three 24-hour shifts, each of 8 hours duty and 16 hours standby, for a total of 72 hours per week; his 14-day pay period thus covers 144 hours of work. In addition to his regular rate of pay under the General Schedule, he receives up to 25-percent of that regular rate as a pay differential "for irregular or intermittent duty involving unusual physical hardship or hazard," as prescribed in 5 U.S.C. § 5545(c)(1). This differential is called premium or "standby" pay. By virtue of 29 U.S.C. § 207(k), quoted above, 106 of the 144 hours per pay period are considered his normal tour of duty, and he is paid overtime pay for the additional 38 hours. There is no dispute about that amount of regular and standby pay nor about the 38 hours for which overtime is paid.

The dispute in this case is over the rate at which petitioners are statutorily entitled to be compensated for the 38 hours of regularly worked overtime. Simply put, the question is whether the Fair Labor Standards Act [1] requires that they be compensated for the 38 hours of over-

---

[1] The Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, extended the Act's coverage to federal employees. The Office of Personnel Management, as successor to the Civil Service Commission, is charged with the Act's administration with respect to federal employees. *See* 29 U.S.C. § 204(f).

time at time-and-a-half pay, rather than, as FPM 551-5 prescribes, at half-time only.

Petitioners, basing their position on the plain meaning of 5 U.S.C. § 5504(b),[2] asserted that although their standby pay may be properly allocable to the entire 144-hour tour of duty, their basic pay must be deemed allocable only to the first 80 hours.

FPM Letter 551-5, in contrast, treats the combined regular and standby pay as a firefighter's "regular rate" for 144 hours of work. Respondents pay one-half that rate for the 38 overtime hours, regarding petitioners as having already been compensated straight time for those 38 hours in the form of their regular and standby pay.

The district court, adhering to the appellate court's earlier decision in *Zumerling*, granted summary judgment for respondents. The court of appeals majority affirmed, upholding the validity of the FPM formula on grounds of the reasonableness of OPM's interpretation and the deference due a consistent agency interpretation, previously upheld by the court, of a statute that it is charged with interpreting. It further stated that "acceptance of [petitioners'] rigid adherence to the printed statute . . . would necessarily mean that the challenges

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[2] At the time suit was filed, the first sentence of § 5504(b) provided that "for pay computation purposes" an employee's rate of basic pay "is deemed payment for employment during 52 basic administrative workweeks of 40 hours." Congress deleted that sentence in 1986. The court of appeals noted that the earlier version of the statute applies to this case (App. at 9a), but expressed doubt that Congress intended the deletion to change significantly the "pay computation method of federal firefighters." *Id.* at 14a. Petitioners agree that the computation of a firefighter's overtime pay should be the same under both the applicable and the current versions of § 5504(b).

previously considered were at least in part incorrectly rejected by this court." (App. at 13a.) It held 5 U.S.C. § 5504(b) to be irrelevant.

The dissent concluded, however, that the statute was directly on point, stating (App. at 26a) that "the additional one-half regular rate method employed by OPM is contrary to statute and must fall."

## REASONS FOR GRANTING THE WRIT

### I. The Court Below Decided an Important Question of Federal Law in a Manner Inconsistent With the Evident Meaning of the Statutory Scheme and Prior Decisions of This Court.

This case presents an important question concerning the interpretation a basic provision of the Fair Labor Standards Act: the computation of "time and one-half" pay for overtime.[3]

The Office of Personnel Management (OPM) has determined that the "regular rate" for federal firefighters is their basic and standby pay spread over 72 hours each week (FPM Letter 551-5, Attachment 2, para. D.2, App. at pp. 62a-63a). Firefighters, therefore, receive only one-half times their regular rate of pay for each of the 19

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[3] The decision below affects the compensation of more than 10,000 federally employed firefighters, most of whom are regularly and customarily employed 72 hours each week. Unlike most other federal employees, who earn overtime pay after 40 hours of work per week, firefighters earn overtime pay only after 53 hours (29 U.S.C. § 207(k)). Thus they work 19 hours of overtime a week, or 38 hours each two-week pay period. In January 1984, petitioners each earned $530.40 basic pay and $132.80 standby pay per pay period (a total of $663.20), for an effective hourly rate of $4.60. For their 38 hours of overtime, each was paid $2.30 an hour (one-half the $4.60 regular rate), or $87.50, as prescribed by FPM 551-5. But ecah should be paid $6.90 per overtime hour (one and one-half times the regular rate), or $262.20, as prescribed by the statute.

hours of overtime because they have already been paid "time" by virtue of receiving their regular rate for working all 72 hours in the workweek.

But Congress itself, in § 5504(b), directed that the basic pay received by all federal employees "is deemed payment for employment during 52 basic administrative workweeks of 40 hours." The majority determined that § 5504(b) "simply is not relevant to a determination of overtime wages" (*id.*), and therefore it considered the interpertation of the meaning of time and one-half by OPM to be "reasonable" even though it is at variance with the plain meaning of § 5504(b).

By deeming § 5504(b) irrelevant, the majority ignored the plain meaning of the section, as it had earlier in *Zumerling v. Devine*, and refused to face the question whether *Zumerling* was wrongly decided.

But in this case, the question of the section's applicability was squarely raised and the record presents the issue with crystal clarity. The government formally admitted in the trial court, pursuant to the Federal Rules of Civil Procedure, that "for pay computation purposes, non-exempt Federal Fire Fighters are deemed to receive payment of their annual rate of GS basic pay for employment during 52 basic administrative workweeks of 40 hours," and that "for pay computation purposes, non-exempt Federal Fire Fighters are deemed to receive no payment of their annual rate of GS basic pay for employment in excess of 40 hours during any of the 52 basic administrative workweeks." *See* App. at 9a.

This Court dealt with a similar question in *Bay Ridge Operating Company v. Aaron*, 334 U.S. 446 (1948), where the Court granted *certiorari* "on account of the importance of the method of computing the regular rate of pay in employment contracts providing for extra pay." *Id.* at 459. There, certain longshoremen covered by a collective bargaining agreement sought to recover statutory over-

time pay under the Fair Labor Standards Act. The labor contracts provided "straight time" pay for a normal workweek of 8 a.m. to 12 noon and 1 p.m. to 5 p.m. Monday through Friday and 8 a.m. to 12 noon on Saturday. A second pay scale, called "overtime," applied to work at all other hours of the week. The contracts provided no pay differential for work in excess of forty hours per week. *Id.* at 451. Because nearly all stevedoring during the war-time period in question was performed for the government, the Department of Justice represented the petitioners, the United States being the real party in interest. *Id.* at 453.

The longshoremen contended that their regular rate of pay for overtime computation purposes must be considered to be the actual pay they received during the first 40 hours of a workweek, even though the forty hours were often a mix between the straight-time and overtime hours prescribed by the labor agreements. The government, on the other hand, argued that no rate except the straight-time rate could be used in computing the longshoremen's regular rates of pay, and that statutory overtime was therefore one and one-half the straight-time rate and no more. *Id.* at 453.

In deciding for the respondents, the Court held (*id.* at 476):

> Each respondent is entitled to receive compensation for his hours worked in excess of forty at one and a half times his regular rate, computed as the weighted average of the rates worked during the week. In computing the amount to be paid, the petitioners may credit against the obligation to pay statutory excess compensation the amount already paid to each respondent which is allocable to work in those excess hours.[4]

[4] The Court emphasized that true overtime compensation, that is, "extra pay for work because of previous work for a specified number of hours in the workweek or workday," is to be excluded from computation of the regular rate. 334 U.S. at 465.

Since the firefighters' basic pay is allocable only to the first 40 hours of work each week, and since they earn 19 hours of statutory overtime in the same period, no part of their basic pay is "allocable to work in those excess hours." *Bay Ridge*, at 476. Hence the government is not entitled, consistent with *Bay Ridge*, to credit itself with having already paid petitioners "100 percent for all hours in his tour of duty" as FPM 551-5 prescribes.

This Court should grant the writ to consider this important question.

**II. The Decision Below Thwarts Fundamental Labor Standards Policies.**

It was in 1945 that Congress ordained that annual basic pay "shall be regarded as payment for employment during fifty-two basic administrative workweeks of forty hours" and that employees should receive "in addition to their basic compensation," overtime pay for work in excess of 40 hours in a week equal to "one and one-half times the basic hourly rate of compensation." Federal Employees Pay Act of 1945, 59 Stat. 296, 304, ch. 212, §§ 201, 604(d), June 30, 1945, now codified at 5 U.S.C. §§ 5504(b), 5542(a).

Before 1945 General Schedule (GS) employees worked a 48-hour week during World War II and received overtime of approximately one and one-twelfth times their basic hourly rate of pay. *See*, 1945 Cong. Rec. 6060-6061, 6064, 79th Cong., 1st Sess., June 13, 1945. Congressman Angell explained the purposes of federal pay reform (*id.* at 6061-6062):

> The Fair Labor Standards Act passed by the Congress some years back requires time and a half overtime in private industry. It would seem fair for the Federal Government to accord the same treatment to its own employees it requires of others * * *.
>
> Mr. Chairman, this bill is in line with the general program of the Congress to classify and stabilize salaries of Federal employees so that they may be on

> a parity, so far as it is possible, with respect to hours, pay schedules, basic time, and overtime.

The Congressional debate expressly included mention of the applicability of the 40-hour week to federal firefighters. (*Id.* at 6672).

In 1954, Congress replaced the time and one-half overtime system for law enforcement officers and firefighters with premium pay (standby pay) of up to 25 percent of the employee's basic pay, in lieu of overtime pay. *See Zumerling v. Devine*, 769 F.2d at 751.

When federal employees were brought within the coverage of the Fair Labor Standards Act in 1974, they once again became entitled to time and one-half overtime pay in addition to their basic pay and standby premium pay. With express reference to firefighters' pay under the Act, the Comptroller General has squarely decided that basic pay is payment only for 80 hours in a two-week pay period. In *Frederick Evans, Jr.*, B-216640, March 13, 1985 (unpublished), (reprinted in App. at p. 40a), the Comptroller General decided against a union's claim that federal firefighters' basic pay should be computed on the basis of their 144-hour tour of duty. He held that firefighters "may not be compensated on the basis of 144 hours times their hourly wage since the existing statutes provide for compensation on the basis of 80 hours times the hourly wage plus a premium for standby duty."

Adhering to his initial decision upon reconsideraton, (B-216650, September 18, 1985 (unpublished), reprinted in App. at p. 46a), the Comptroller General stated:

> The union cites provisions of the FPM which state that when an employee is paid additional pay under section 5545(c)(1), the employee's regularly scheduled administrative workweek is the total number of regularly scheduled hours of duty a week. *But the length of the administrative workweek does not allow the employee to receive basic pay for hours of work in excess of 40 hours per week.* (Emphasis added).

These decisions further evince the strong statutory policy underlying the payment of basic pay only for a forty-hour week.

Employers have previously contended, as does OPM in FPM Letter 551-5, that employees paid a salary for more than 40 hours of work were entitled only to "half-time" as extra compensation for overtime, because they already had received straight time for all hours worked as part of their salary. But in *United States v. Townsley*, 323 U.S. 557 (1945), this Court rebuffed the argument.[5]

*Townsley* involved the overtime claim of a federal employee regularly scheduled to work 48 hours per week. The statute there applicable,[6] like section 7 of the Fair Labor Standards Act and 5 U.S.C. § 5504(b), provided that "the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at a rate of not less than time and one half."

The government contended that if the statute applied at all to the employee, who was paid a monthly wage, then his overtime entitlement for the regularly scheduled six-day workweek was limited to an additional one-half straight time for the additional eight hours worked, since his basic pay compensated him for every day in the month. Thls Court rejected the contention (323 U.S. at 573):

> [A]ccording to this contention, the respondent will already have been overpaid for, according to the

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[5] *Cf. Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942), where this Court's approved the payment of half-time under the Fair Labor Standards Act where the employee's weekly salary was meant to compensate him for all hours, including overtime hours, worked in a widely fluctuating weekly schedule. The case has no application here, where a firefighter's tour of duty is fixed and his basic and premium pay compensate him for only a portion of those hours.

[6] Section 23 of the Independent Offices Appropriation Act of 1935, Act of March 28, 1934, c. 102, 48 Stat. 522.

> argument, he has been paid straight time for the seventh day of each week although he only worked six days and has, therefore, received additional overtime pay for the sixth day. * * * After the adoption of [the statute] the respondent was in effect hired for a work week of forty hours, or a five day week, and his daily wage was to be determined on that basis. He has not been paid for the sixth day of each week and should recover straight time and one-half for the sixth day.

*Townsley* teaches that half-time pay for overtime is not justified, even though an employee is regularly scheduled to work more than 40 hours a week, when his weekly pay is intended to cover only 40 hours of work. The same principle, grounded in strong statutory policy, applies to petitioners, whose basic and standby pay covers only 106 of their 144 hours of work per pay period. They have not been paid straight time for the other 38 hours. This Court should not permit the government to thwart Congress' intent.

## CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDICES

**APPENDIX**

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

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No. 87-1138

RICHARD A. LAFORTE and RICKEY A. ROGERS,
*Plaintiffs-Appellants,*

v.

CONSTANCE HORNER, DIRECTOR,
U.S. OFFICE OF PERSONNEL MANAGEMENT and the
UNITED STATES OF AMERICA,
*Defendants-Appellees.*

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Nov. 17, 1987

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Ira N. Leckner, Connerton & Bernstein, Washington, D.C., argued for plaintiffs-appellants. With him on the brief was Linda Lipsett.

Robert A. Reutershan, Asst. Director, Commercial Litigation Branch, Dept. of Justice, Washington, D.C., argued for defendants-appellees. With him on the brief were Richard K. Willard, Asst. Atty. Gen. and David M. Cohen, Director.

Before MARKEY, Chief Judge, BENNETT, Senior Circuit Judge, and NEWMAN, Circuit Judge.

PER CURIAM.

## DECISION

Appellants, two federal firefighters, appeal from the judgment of the United States District Court for the District of Maryland (Black, J.), granting appellee's motion for summary judgment. Correspondingly denying appellants' motion for summary judgment, the district court ruled that the formula in Federal Personnel Manual (FPM) Letter 551-5 used by the Office of Personnel Management (OPM) to calculate the overtime pay entitlements for appellant firefighters under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1982 & Supp. III 1985), was valid and in conformity with the requirements of Title 5, the FLSA, and Department of Labor regulations. We affirm.

## BACKGROUND

At the time that this action was filed, appellants Richard A. LaForte and Rickey A. Rogers were civilian federal firefighters (grade GS-5, step 1) employed at Andrews Air Force Base in Maryland. Federal firefighters do not work a 40-hour workweek, but instead are employed for 144 hours per 14-day biweekly work period. The firefighters are on duty for six 24-hour shifts during each 14-day work period. Each 24-hour shift consists of 8 hours of work, and 16 hours of standby time during which the firefighters are confined to their work stations and subject to immediate duty in the event of a fire or other emergency.

Congress recognized that the work schedules of firefighters differ from those of typical general schedule (GS) government employees and provided for those differences in the statutes governing the firefighters' pay. The firefighters receive basic general schedule pay, *see* 5 U.S.C. § 5332, and in addition, in accordance with 5 U.S.C. § 5545(c)(1) (1982), the firefighters receive "premium pay" of up to 25 percent of their basic GS pay in recognition of the substantial portion of their

regularly scheduled duty spent in a standby status. Additionally, section 7(a) of the FLSA provides that federal employees are not to be employed for a longer workweek than 40 hours unless they receive compensation at a rate not less than one and one-half times the regular rate at which they are employed. However, federal firefighters initially were excepted from the FLSA provisions when the federal government became subject to the FLSA in 1974.

An amendment to the FLSA, taking effect on January 1, 1975, and codified as 29 U.S.C. § 207(k), provided an exception to section 207(a) for public agency employees engaged in fire protection services. The current version of 29 U.S.C. § 207(k) reads, in pertinent part, that:

> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities . . . if—
>
> > (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours . . . in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or
> >
> > (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,
>
> compensation at a rate not less than one and one-half times the regular rate at which he is employed.

Thus, in addition to their basic pay and premium pay, federal firefighters also are entitled to receive additional compensation under the FLSA, the amount of which is calculated in accordance with the formula outlined in FPM Letter 551-5. FPM Letter 551-5 was promulgated by the Civil Service Commission, the predecessor agency to OPM, within weeks of the enactment of section 207(k) and contained detailed guidelines for computing FLSA pay for firefighters in accordance with that section. However, not satisfied with the manner in which their FLSA overtime compensation was calculated, the appellants filed suit in the district court, challenging the validity of the FPM formula and seeking to recover any compensation improperly withheld, together with interest, liquidated damages, and attorneys' fees as provided in 29 U.S.C. § 216(b).

The appellants' suit is not the first court challenge to the method by which federal firefighters are compensated. The leading case is *Zumerling v. Devine*, 769 F.2d 745 (Fed.Cir.1985), a case involving a challenge to the computation method of firefighters' FLSA pay in which this court decided several issues that provide a backdrop for the present case. We will not repeat the entire analysis contained in the *Zumerling* opinion; nevertheless, an understanding of the issues presented and decided in that case is crucial to the resolution of the present case.

Under section 7 of the FLSA, federal firefighters are entitled to be compensated at a rate not less than one and one-half times their "regular rate" of pay, *see* 29 U.S.C. § 207(e), for a portion of their 144-hour, 2-week work period. The plaintiffs in *Zumerling* challenged the method in which the regular rate was calculated under FPM Letter 551-5 as used by OPM.[1] The court in *Zum-*

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[1] The district court in the *Zumerling* case noted that "[p]laintiffs do not challenge F.P.M. Letter 551-5." *Zumerling v. Marsh*, 591 F.Supp. 537, 540 n.4 (W.D.Pa. 1984). Appellants here rely on that footnote as grounds for this panel to review FPM Letter 551-5 on a

*erling* observed that OPM had the authority to interpret the FLSA statute and concluded that FPM Letter 551-5 was a valid exercise of that authority. 769 F.2d at 750 (citing *Beebe v. United States*, 640 F.2d 1283, 226 Ct.Cl. 308 (1981)). Citing with approval the discussion in *Alexander v. United States*, 1 Cl.Ct. 653 (1983), the court concluded that OPM's administration of the FLSA overtime provisions was both reasonable and consistent with the statute, the regulations promulgated by the Secretary of Labor, and the intent of Congress. 769 F.2d at 749-52.

The court in *Zumerling* expressly decided that the "regular rate" of pay for firefighters is equal to the employees' total remuneration (basic pay plus premium pay) divided by the total number of hours worked in a work period (144 hours). *Id.* at 749-52. In reaching this conclusion, the court determined that the premium pay received by the firefighters was not excluded under 29 U.S.C. § 207(e) from being included in the regular rate calculation:

> The firefighters' premium pay is not received in return for any particular hours of work. Rather it is a function of the government's recognition that firefighters don't work the typical work schedule of the federal system. The annual basis payment, therefore, is not an overtime payment, but a means of generally compensating the employees given the confines of the federal pay schedule. As such, it is part of the wage typically paid for each hour of work and must be included [in the calculation of "regular rate"].

*Id.* at 751. Therefore, the court rejected arguments that the "total remuneration" should not include premium

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clean slate. However, it is clear from an examination of the prior opinion of this court in the appeal from that decision in that case that FPM Letter 551-5 was indeed "squarely at issue" and addressed by this court. 769 F.2d at 747.

pay received pursuant to 5 U.S.C. § 5545. The court also rejected the argument that, in order to determine the "regular rate," the total remuneration should not be divided by the total number of hours for which it is received, 144 hours in a 2-week pay period.[2] Finally, the court concluded that the formula reflected in the FPM Letter was both proper and consistent with the statute and regulations in allowing additional compensation of one-half the regular rate rather than one and one-half times the rate because the employee's total remuneration calculation compensates the employee at 100 percent for all the hours in his tour of duty and the additonal one-half thereby allows the employee to receive one and one-half times the regular rate at which he or she is employed. 769 F.2d at 752-53.

In granting the government's motion for summary judgment in the present case, the district court ruled that issues in *Zumerling* were identical to those presented by the case before it, that the result reached there was correct, and that, in any event, it was bound by that decision since any appeal in the present case would come to this court. Not surprisingly, in appealing the district court's decision in this court, the appellants argue that *Zumerling* did not decide issues identical to the present case and, to the extent that it did, it was wrongly decided. However, to the extent that the issues in the present case are identical to those decided in *Zumerling*, this panel is bound by that decision as only the court sitting in banc can overrule prior decisions of this court. *Capital Electric Co. v. United States*, 729 F.2d 743, 746 (Fed.Cir.1984). Thus, we must identify and address the issues raised in this appeal left unanswered by the court

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[2] Specifically, the plaintiffs in *Zumerling* had proposed that the regular rate be calculated as the employees' GS basic pay for the 2-week work period divided by 80 hours or, alternatively, as the employees' total remuneration (basic pay plus premium pay) divided by the statutory average tour of duty (the statutory nonovertime hours) as calculated under 29 U.S.C. § 207(k). *See also Wheeler v. United States*, 9 Cl.Ct. 579 (1986).

in *Zumerling* or alternatively conclude, as did the district court, that the issues presented are identical and that we are bound by that decision.

## OPINION

Having seen a series of challenges to the method in which the firefighters' regular rate is calculated under FPM Letter 551-5 rejected by the decisions in *Zumerling* and *Wheeler*, the appellants here do not challenge the regular rate calculation but now choose to attack the adequacy of their pay calculation from another direction by challenging what the OPM can properly use as an offset against the one and one-half times regular rate amount that constitutes their minimum compensation entitlement under 29 U.S.C. § 207(k). The appellants provide several alternative grounds in support of their position which distills into a single proposition. The appellants argue, in short, that they cannot be deemed to receive their regular rate of pay for each of the 144 hours that they are on duty because basic pay is limited by 5 U.S.C. § 5504(b) to 80 hours per week.

Thus, while conceding that *Zumerling* held that premium pay is earned in every hour on duty, appellants contend that the basic GS pay of a federal firefighter can only be deemed payment for 80 hours of work in a 2-week work period and therefore cannot be considered either as payment for any of the 38 hours for which they are to be compensated under 29 U.S.C. § 207(k) or as an offset against the government's liability to pay appellants one and one-half times their regular rate for those hours.[3] Thus, appellants argue that they should be deemed to receive both basic pay and premium pay for

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[3] Under 29 U.S.C. § 207(k), the appellants in this case were apparently entitled to such compensation after 106 hours in their 144-hour, 2-week work shift. In *Zumerling*, the firefighters were entitled to be compensated at one and one-half times their regular rate after 108 hours of duty. 769 F.2d at 747. *See also Lanehart v. Horner*, 818 F.2d 1574, 1576 n. 4 (Fed.Cir. 1987).

only the first 80 hours of each 2-week work period and to receive only premium pay for the last 64 hours, including the 38 hours for which they are to be compensated in accordance with 29 U.S.C. § 207(k). Since they are entitled to one and one-half times their regular rate for each of the last 38 hours worked in each 144-hour work period, appellants contend that their pay (per hour) for those hours should equal the difference between one and one-half times their regular rate and their "hourly premium pay" instead of one-half times their regular rate as instructed by FPM Letter 551-5.[4]

Appellants base their argument on the language of 5 U.S.C. § 5504(b) which stated, at the time relevant to this case:

> For pay computation purposes affecting an employee, the annual rate of basic pay established by or under statute is deemed payment for employment during 52 administrative workweeks of 40 hours. When it is necessary for computation of pay under this subsection to convert an annual rate of basic pay to a basic hourly . . . rate, the following rules govern:

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[4] The appellants' arguments necessarily require that a federal firefighter such as one of the appellants be deemed to receive his overall pay during his regularly scheduled 144-hour work period in the following manner. In each of the first 80 hours, he would receive 1/80th of his basic GS pay for the 2-week period and 1/144th of his premium pay for the 2-week period. For each of the next 26 hours, he would only receive 1/144th of his premium pay. Finally, for the last 38 hours, he would be deemed to receive 1/144th of his premium pay and sufficient additional pay to bring the total compensation for each of those 38 hours to equal his regular rate of pay times one and one-half. Thus, since the appellants have already received one-half their regular rate of pay for each of the last 38 hours in the 2-week work period, their proposed calculation would mean that they have been underpaid for each of the last 38 hours of each 2-week work period by an amount equal to the difference between their regular rate of pay and 1/144th of their premium pay for the 2-week period.

(1) To derive an hourly rate, divide the annual rate by 2,080.[5]

They also base their argument on two responses made by the government in the course of this litigation to requests for admissions. In response to the first request, the government responded "admit" to the query that "for pay computation purposes, non-exempt Federal Fire Fighters are deemed to receive payment of the annual rate of GS basic pay for employment during 52 basic administrative workweeks of 40 hours." To the second request, the government also answered "admit" to the query that "for pay computation purposes, non-exempt Federal Fire Fighters are deemed to receive no payment of their annual rate of GS basic pay for employment in excess of 40 hours during any of the 52 basic administrative workweeks." Appellants argue that these admissions confirm the plain meaning of section 5504(b) and should be deemed admissions against interest under Fed. R.Civ.P. 36(b).

Addressing the appellants' last contention first, we note that requests for admissions are designed to secure the just, speedy and inexpensive determination of actions by avoiding the time, trouble and expense required to prove undisputed facts which should be admitted. Fed. R.Civ.P. 36(b). The government argues that its admissions were intended merely to admit that section 5504(b) "says what it says." Since appellants' argument is based on "the plain language" of section 5504(b), it could be presumed that they could read what section 5504(b) says without the government's redundant assistance. Nevertheless, we do not find the government's admissions to be determinative of the meaning of 5 U.S.C.

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[5] In 1986, among other changes, the entire first sentence quoted in the text was deleted from the statute language. *See* Consolidated Omnibus Budget Reconciliation Act of 1985, Pub.L. No. 99-272, § 15203, 100 Stat. 82, 334 (1986) (codified at 5 U.S.C. § 5504(b) (Supp. IV 1986)).

§ 5504(b) intended by Congress. That question is a legal issue which must be determined, if necessary, by the courts, and one which the appellants have addressed comprehensively and exhaustively in their briefs. Furthermore, as the government's admissions do simply parrot the language of the statute, the true import and meaning of the government's admissions depend upon the proper interpretation of the statute. We do not believe that the appellants have been prejudiced in advancing their arguments without reliance on the government's admissions. *See Gutting v. Falstaff Brewing Corp.*, 710 F.2d 1309, 1314 (8th Cir. 1983); *see also Hill v. United States*, 571 F.2d 1098, 1103 n. 9 (9th Cir.1978).

As noted above, the court in *Zumerling* stated that "employees receive their regular rate of pay for each of the 144 hours they work." 769 F.2d at 752. Thus, the government argues that the *Zumerling* opinion rejected the basic premise of the appellants' case—that they do not receive their regular rate of pay for each of the 144 hours in their 2-week work period—and therefore should control this case. However, appellants argue that the court did not expressly determine whether 5 U.S.C. § 5504(b) had any relevance, in the manner urged here by appellants, to the allocation of the appellants' pay to the various hours worked. Contrary to the government's contentions, an awareness of section 5504(b), as indicated by citation to it by both the district court and this court in their respective *Zumerling* opinions, does not necessarily without more show an implicit consideration and rejection by the courts of the specific interpretation urged here.[6]

Nevertheless, having examined the appellants' contentions carefully, we are not persuaded that their reading

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[6] On the other hand, we note that the Claims Court in *Wheeler* apparently was not struck by the "plain language" of section 5504(b) when rejecting an assertion based on section 5504(b) that calculation of the regular rate should be based on 80 hours, rather than 144 hours. 9 Cl.Ct. at 583-84 (relying on *Zumerling*).

of section 5504(b) properly reflects the intent of Congress with respect to those federal employees engaged in fire protection services. Nor do appellants' arguments persuade us of the need to alter the result reached in *Zumerling*. It is axiomatic that "a clear and unambiguous statute speaks for itself." *Selman v. United States*, 498 F.2d 1354, 1356, 204 Ct.Cl. 675 (1974). *See also Horner v. Jeffrey*, 823 F.2d 1521, 1525 (Fed.Cir. 1987). However, it is also true that "even where a statute is clear on a purely linguistic level, interpretation may be necessary if that interpretation does not do justice to the realities of the situation." *Texas State Commission for the Blind v. United States*, 796 F.2d 400, 406 (Fed.Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 874, 93 L.Ed.2d 828 (1987); *see also Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892). The realities of the situation before us are that Congress has recognized that firefighters are not situated the same as other general schedule federal workers and that firefighters do not work standard 40-hour workweeks. As a result, the compensation scheme applicable to firefighters as devised and intended by Congress differs significantly from that of the standard GS federal employee. *See Wheeler*, 9 Cl.Ct. at 581.

Here, FPM Letter 551-5 was issued by the Civil Service Commission within 2 weeks of the effective date of the amendment to the FLSA which became 29 U.S.C. § 207(k) and is a comprehensive document covering all aspects of the pay entitlements of federal employees engaged in firefighting and law enforcement activities under the FLSA and Title 5. *See United States v. Clark*, 454 U.S. 555, 565, 102 S.Ct. 805, 811-12, 70 L.Ed.2d 768 (1982) ("construction of a statute by those charged with its administration is entitled to great deference, particularly when that interpretation has been followed consistently over a long period of time"). As recognized in *Zumerling*, OPM had "the power to interpret the FLSA

statute and to set forth the guidelines and policy of the agency" and the court concluded that FPM Letter 551-5 was a valid exercise of the authority delegated to it by Congress. 769 F.2d at 750. As stated by this court recently in *Slugocki v. United States*, 816 F.2d 1572, 1578 (Fed.Cir.1987), *petition for cert. filed*, 56 U.S.L.W. 3184 (U.S. Aug. 31, 1987) (No. 87-361):

> This court [in *Zumerling*] held that "OPM's administration of the FLSA overtime provisions [was] both reasonable and consistent with the statute, the regulations promulgated by the Secretary of Labor, and the intent of Congress." . . . Moreover, one of our predecessor courts, the Court of Claims, held in *Beebe v. United States*, 640 F.2d 1283, 226 Ct.Cl. 308 (1981), that FPM Letter 551-5 was a proper exercise of authority delegated to OPM and that it was proper for an agency to rely on it in implementing the FLSA provisions. *Zumerling*, 769 F.2d at 750. We are bound by the *Zumerling* and *Beebe* decisions. . . .

In keeping with the Supreme Court's instructions, this court has consistently stressed that its review of an agency regulation is restricted in that "[t]he long-standing interpretation placed on a statute by the agency charged with its administration should be followed unless they are compelling reasons that it is wrong." *Money v. Office of Personnel Management*, 811 F.2d 1474, 1477 (Fed.Cir.1987) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984); *see also Minnesota Power & Light Co. v. United States*, 782 F.2d 167, 170 (Fed.Cir.1986). As this court stated in *Consumer Products Division, SCM Corp. v. Silver Reed America, Inc.*, 753 F.2d 1033, 1039 (Fed.Cir.1985):

> [I]t is a cardinal principle that the Secretary's interpretation of the statute need not be the *only* reasonable interpretation or the one which the court

> views as the most reasonable. *See, e.g., Fulman v. United States*, 434 U.S. 528, 534-36 [98 S.Ct. 841, 845-46, 55 L.Ed.2d 1] (1978) (regulation which had a "reasonable basis" in the statutory history upheld, even though taxpayer's challenge had "logical force"). *See also United States v. Correll*, 389 U.S. 299, 307 [88 S.Ct. 445, 450, 19 L.Ed.2d 537] (1967) ("[I]f found to 'implement the Congressional mandate in some reasonable manner,' [the regulation] must be upheld.").

(Emphasis and bracketed material in original.)

In the case before us, the computation formula proposed by appellants appears to be confusing, to say the least, and perhaps unworkable. Even if it was deemed logical or reasonable in its own right, the issue before us is not the reasonableness of the appellants' method but whether the method employed by OPM to calculate the appellants' pay is reasonable and in accordance with the statute. We believe that the interpretation given by OPM to the relevant statutes, as reflected in FPM Letter 551-5, is entirely reasonable. Furthermore, we believe that the deference to be paid to a consistent agency interpretation of a statute that it is charged with interpreting is even more compelling when that interpretation has been upheld several times by the reviewing court. While appellants' argument poses a challenge to FPM Letter 551-5 in a slightly different light from the previous challenges, acceptance of its rigid adherence to the printed statute without taking into consideration Congress's overall compensation scheme for federal firefighters would necessarily mean that the challenges previously considered were at least in part incorrectly rejected by this court. We do not agree with such a result, even if we were empowered to reach it.

It is clear that appellants could not advance their current argument based on the language of section 5504(b) as it now reads because, as noted above, the Consolidated

Omnibus Budget Reconciliation Act of 1985 deleted the sentence from section 5504(b) relied on by appellants. We do not believe that Congress intended that amendment to make a significant and substantive change to the pay computation method of federal firefighters. The section in the Act enacting the amendment to section 5504(b) was entitled "Computation of Hourly Rates of Pay," which appears to confirm that section 5504(b) was never intended to do anything more than provide a method to enable employees receiving annual pay to calculate a corresponding hourly, daily, or weekly rate. In fact, the lack of any specific legislative history accompanying the 1986 amendments to section 5504(b) indicates that Congress was unaware of any arguable effect the amendments might have on firefighters' pay and is an even better indication that Congress did not amend section 5504(b) with the precise issue of the firefighters' FLSA pay in mind. This confirms our result since where "Congress has not directly addressed the precise question at issue," the question for the reviewing court is only whether the interpreting agency's answer "is based on a permissible construction of the statute." *Chevron U.S.A.*, 467 U.S. at 843, 104 S.Ct. at 2782.

We believe that the OPM's interpretation is permissible and reasonable in light of the statutes. We find the appellants' proposed pay computation method to be just one more attempt by federal firefighters to gain a pay windfall through creative mathematics rather than from the intentions of Congress. Therefore, we conclude, as did the district court in this case, that 5 U.S.C. § 5504(b) is "simply not relevant to a determination of overtime wages" for federal firefighters. The judgment of the district court is affirmed.

AFFIRMED.

BENNETT, Senior Circuit Judge, dissenting.

I respectfully dissent. I do so with firm conviction, but great reluctance as my review of the present case leads me to disagree not only with the conclusions of the present majority, but with certain aspects of the result previously reached by this court in *Zumerling v. Devine*, 769 F.2d 745 (Fed.Cir.1985). Mindful of the doctrine of stare decisis and of the reluctance of courts to overrule recent decisions, and in full recognition that any alteration of the reasoning and conclusions in *Zumerling* would require in banc action by this court, I nevertheless feel compelled to outline my disagreement here, my first opportunity to do so.[1]

It is clear that this court in *Zumerling* did not expressly address nor, in my opinion, did it implicitly determine the effect of 5 U.S.C. § 5504(b) on the calculations relevant to the federal firefighters' pay entitlements. Unlike the majority, I have been convinced that section 5504(b) is quite relevant to both the result in *Zumerling* and the pay computations of federal firefighters in general. In my view, the plain language of 5 U.S.C. § 5504(b) unavoidably compels the conclusion urged by appellants that the annual rate of basic GS pay of every federal employee, including federal firefighters such as appellants, is and should only be considered as "payment for employment during 52 basic administrative workweeks of 40 hours." [2]

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[1] I further note that the ramifications resulting from the adoption of my view might not be confined to *Zumerling* as the conclusions contained therein with which I disagree have bene relied on in subsequent decisions of this court and of the Claims Court. *See, e.g., Slugocki v. United States*, 816 F.2d 1572 (Fed.Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3184 (U.S. Aug. 31, 1987) (No. 87-361); *Wheeler v. United States*, 9 Cl.Ct. 579 (1986).

[2] Contrary to the majority's suggestion, the 1986 amendment deleting the specific language relied on by the appellants from the statute has no relevance to the present appeal. If the amendment

Neither the majority nor the appellees have offered, nor have I been able to discern on my own, any supportable justification for excluding firefighters from the plain language of 5 U.S.C. § 5504(b). In fact, federal firefighters were not excepted from the provisions of the section when it was enacted and there has been no suggestion or showing that subsequent statutory enactments and amendments affecting the pay of the firefighters did anything to alter the section's applicability to federal firefighters. Actually, as discussed below, the legislative histories of the subsequent statutes and amendments provide additional support for this conclusion. *Cf. Horner v. Jeffrey*, 823 F.2d 1521 (Fed.Cir.1987) (plain and unambiguous language of a statute, especially where supported by clear legislative history, is determinative even where agency regulation in conflict with statute has been consistently applied over long period). Thus, in accordance with this court's actions in *Jeffrey* where an agency's regulations were in conflict with a statute, I must conclude that those portions of FPM Letter 551-5 which are contrary to the intentions of Congress, as evidenced in plain statutory language and confirmed by accompanying legislative history, are invalid with respect to firefighters such as appellants.[3] *See Board of Gover-*

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was not intended to be a substantive change, it is clear that prior to the amendment basic pay was intended by Congress to be compensation for only 40 hours per week and therefore must still be considered as such. On the other hand, if the amendment was intended to be substantive and to alter the pay entitlements of federal firefighters, it has no relevance here as the present suit was filed prior to March 1, 1986, the effective date of the amendment. *See* Pub.L. No. 99-272, § 15203(b), 100 Stat. 82, 334 (1986).

[3] Other cases cited in the majority opinion and the briefs involving the same or similar issues have involved federal law enforcement personnel in addition to or in lieu of firefighters. While similarly situated to firefighters in many respects, I express no opinion here as to whether the conclusions reached in this opinion would be applicable to federal personnel other than firefighters. *See, e.g., Slugocki*, 816 F.2d 1572 (Deputy United States Marshals);

*nors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 368, 106 S.Ct. 681, 686, 88 L.Ed.2d 691 (1986) (traditional deference courts pay to agency interpretation is not to be applied to alter clearly expressed intent of Congress); *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 8 L.Ed.2d 694 (1984); *Jeffrey*, 823 F.2d at 1531 (and cases cited therein).

As appellants point out, the predecessor to 5 U.S.C. § 5504(b) was enacted as part of the Federal Employees Pay Act of 1945 [hereinafter "1945 Act"], Pub.L. No. 79-106, ch. 212, § 604(b) & (d)(1), 59 Stat. 295, 303-04 (codified at 5 U.S.C. § 944 (1946)). The 1945 Act was part of a comprehensive post-war effort to improve wage and salary administration in the federal service and included, inter alia, pay provisions for overtime, night, and holiday work. The 1945 Act provided that federal employees covered by its provisions would receive compensation for all officially ordered or approved hours of employment in excess of 40 in any administrative workweek at overtime rates, dependent upon their annual basic salary, of up to one and one-half times their basic hourly rate of compensation. *See id.* § 201, 59 Stat. at 296-97. Most importantly, for the purposes of the present discussion, federal firefighters were included among the employees covered by the hourly pay provisions of the Act and therefore received overtime compensation for all hours worked in excess of 40 in any single week.

In 1954, Congress amended section 201 of the 1945 Act to provide overtime pay at one and one-half rate for all employees whose basic salaries did not exceed the maximum scheduled rate of grade GS-9. Federal Employees Pay Act Amendments of 1954, Pub.L. No. 83-763, ch. 1208, § 203, 68 Stat. 1105, 1109 [hereinafter

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*Zumerling*, 769 F.2d 745 (firefighters and law enforcement personnel); *Alexander v. United States*, 1 Ct.Cl. 653 (1983) (customs service employees).

"1954 Amendments"]. However, by this time Congress had also recognized that firefighters and law enforcement personnel did not fit well within the standard overtime-pay provisions of the 1945 Act and that the inclusion of those two groups caused serious administrative problems as a result of the large amount of irregular overtime or standby duty required of these employees. *See* S.Rep. No. 1992, 83rd Cong., 2d Sess., *reprinted in* 1954 U.S.Code Cong. & Ad. News 3816, 3834 (report of U.S. Civil Service Commission on S. 2665). As a result, Congress enacted a new title into the 1945 Act which provided for premium compensation on an annual basis at a rate not to exceed 25 percent of the basic pay for GS-9 in lieu of all overtime, night, and holiday pay for all employees who, like the firefighters in this case, spent a substantial amount of time in a standby status. That new title, in part, provided the following:

> Sec. 401. The head of any department, independent establishment, or agency, including Government-owned or controlled corporations, or of the municipal government of the District of Columbia may, with the approval of the Civil Service Commission, provide that—
>
> > (1) any officer or employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium compensation for such duty on an annual basis in lieu of premium compensation provided by any other provisions of this Act. Premium compensation under this paragraph shall be determined as an appropriate percentage (not in excess of 25 per centum) of such part of the rate of basic compensation for any such position as does not exceed the minimum scheduled rate

> of basic compensation provided for grade GS-9. . . .

1954 Amendments, § 208, 68 Stat. 1111.[4]

Thus, by 1954, Congress had explicitly recognized that firefighters did not work a standard 40-hour workweek like other federal employees and had included specific, separate provisions in the pay statutes to account for the differences. But it is also clear that prior to 1954, federal firefighters had been deemed to be paid their basic GS pay for 52 consecutive workweeks of 40 hours, just like other federal employees. The government argues here that the adoption of premium pay in 1954 indicates that section 5504(b) no longer had any applicability to those federal employees covered by the premium pay provisions contained in the new title. But it is undeniable, and the government concedes, that Congress did not expressly alter the provisions of the predecessor to 5 U.S.C. § 5504(b) to provide an exception for federal firefighters. Repeals by implication can only be justified where the earlier and later statutes cannot be reconciled. *Morton v. Mancari*, 417 U.S. 535, 550, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290 (1974); *Jeffrey*, 823 F.2d at 1527. However, as will be seen, no fatal irreconcilability exists in the present case to support an implied repeal of section 5504(b) with respect to federal firefighters. In fact, since premium pay was designed to compensate only for the hours worked in excess of 40 in a given week, the premium pay statutes are in perfect harmony with the language of section 5504(b) making basic pay attributable only to the first 40 hours of the workweek.

Following the addition of the new title in the 1954 Amendments, firefighters did not receive any one and one-half time compensation for overtime as the premium

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[4] By 1970, the upper limit for such pay had been changed to the minimum rate of basic pay for GS-10. *See* 5 U.S.C. § 5545(c)(1) (1970).

pay and basic pay were the sole compensation paid to the firefighters, regardless of the number of scheduled and unscheduled hours worked. *Cf. Bean v. United States*, 175 F.Supp. 166, 146 Ct.Cl. 267 (1959). However, Congress soon realized that the firefighters and other classes of employees subject to long standby duty were the only salaried federal employees who received no compensation for unscheduled and irregular overtime duty performed beyond their regularly scheduled tours of duty. *See* H.Rep. No. 1870, 85th Cong., 2d Sess., *reprinted in* 1958 U.S.Code Cong. & Ad. News 3047, 3048 (report on S. 1901). Therefore, Congress amended the new section 401 added by the 1954 Amendments to allow the firefighter one and one-half time overtime compensation for "irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour," such as when a fire emergency required a firefighter to work beyond the end of his regular tour of duty. Act of July 18, 1958, Pub.L. No. 85-525, 72 Stat. 363 (codified at 5 U.S.C. § 926 (1958)) [hereinafter "1958 Amendment"]; *cf. Burich v. United States*, 366 F.2d 984, 177 Ct.Cl. 139 (1966), *cert. denied*, 389 U.S. 885, 88 S.Ct. 152, 19 L.Ed.2d 182 (1967). As explained in the House Report accompanying the 1958 Amendment, "[the premium pay compensation system] will remain in effect *but will represent compensation only for those hours of work in excess of 40 hours per week* performed by an employee *within his regularly scheduled tour of duty.*" H.Rep. No. 1870, 85th Cong., 2d Sess., *reprinted in* 1958 U.S.Code Cong. & Ad. News at 3048 (emphasis added).

The above legislative history confirms that premium pay was intended by Congress to be considered as compensation for only those hours of work in excess of 40 hours per week performed by an employee within his regularly scheduled tour of duty. Unfortunately, this conclusion suggests that the statement from *Zumerling* that the "firefighters' premium pay is not received in

return for any particular hours of work" is not entirely accurate. *See* 769 F.2d at 751. In actuality, an employee's premium pay is received for an identifiable portion of work—those hours in an employee's regularly scheduled tour of duty in excess of the first 40 hours per week compensated by basic GS pay in accordance with 5 U.S.C. § 5504(b). In the case of the appellants, therefore, their basic pay should be considered payment only for the first 80 hours in each scheduled 144-hour work period and their premium pay properly should be considered payment only for the last 64 hours of each scheduled work period.

However, the issue raised by appellants here as to the proper calculation of their overtime entitlement under the provisions of the FLSA cannot be resolved solely by concluding that basic pay under 5 U.S.C. § 5504(b) is attributable only to 40 hours per week and by attributing premium pay to the remaining regularly scheduled hours in excess of 40 each week. The appellants expressly stated that they were not challenging any of the conclusions in *Zumerling* with respect to the regular rate calculation itself; however, in order to resolve properly the challenges that appellants do make, reexamination of those conclusions is unavoidable, especially in light of the heretofore unrecognized applicability of section 5504(b) to the pay entitlement calculation.

As discussed in the majority opinion, the firefighters became entitled in 1975 to additional compensation under the amendment to the FLSA which became section 207(k). Under section 207(k), a federal firefighter is to receive compensation at a rate not less than one and one-half times his regular rate for tours of duty in which the aggregate hours exceed a statutorily defined "maximum" number of hours which, in the case before us, is 106 hours in a 144-hour work period. *See Wheeler*, 9 Cl. Ct. at 581. *Zumerling* held that a firefighter's regular rate as calculated under 29 U.S.C. § 207(e) is equal to

the employee's total remuneration (basic pay plus premium pay) divided by the total number of hours worked in a work period (144 hours). 769 F.2d at 749-52. The *Zumerling* decision also concluded that premium pay did not fall within the statutory exclusions of 29 U.S.C. § 207(e) and therefore rejected arguments that the "total remuneration" should not include premium pay received pursuant to 5 U.S.C. § 5545(c)(1). *Id.* at 752. Although in my opinion the characterization of premium pay as generally compensating the employees for each hour of work is not what Congress intended, it does not appear that adoption of the view as outlined in this opinion would require modification of the regular rate calculation previously upheld in *Zumerling*.

Even though the firefighters' premium pay was actually intended to compensate for regularly scheduled hours worked in excess of 40 in a week, it does not necessarily follow that such premium pay should be considered as an overtime premium payment under the FLSA provisions in Title 29. As recognized in the *Zumerling* decision:

> Simply because the remuneration is labeled "premium pay" under Title V does not mean that it is excluded as premium pay under the FLSA. Section 7(e) does not provide a blanket exclusion of premium pay; rather only premium pay received for certain activities is excluded.

769 F.2d at 751.

When it was first enacted in the 1954 Amendments, premium pay was an increased percentage of annual basic pay paid in lieu of overtime, holiday, and other premium compensation. With respect to firefighters, the premium pay provided under 5 U.S.C. § 5545(c)(1) is a percentage of annual basic pay given in recognition of the long periods of standby duty as part of the employee's normal working hours and is not covered by any

of the exceptions noted in 29 U.S.C. § 207(e). *See* 29 C.F.R. § 778.308 ("to qualify as an overtime premium under section 7(e)(5), (6), or (7), the extra compensation for overtime hours must be paid pursuant to a premium rate which is . . . a rate per hour"); *cf. Slugocki*, 816 F.2d at 1578. As pointed out by the government, unlike other forms of premium pay contained in Title 5, the firefighters' premium pay is treated as basic pay in computing benefits for retirement, 5 U.S.C. § 8331(3)(D), life insurance, 5 U.S.C. § 8704(c)(1), severance pay, 5 U.S.C. § 5595(e), and workers compensation, 5 U.S.C. § 8114(e). Thus, the holding in *Zumerling* that premium pay is "not an overtime payment, but a means of generally compensating the employees given the confines of the federal pay schedule," 769 F.2d at 751, is the proper interpretation in the context of the FLSA provisions in Title 29.

Therefore, as was concluded in *Zumerling*, the numerator of the regular rate calculation outlined in FPM Letter 551-5 properly includes both the firefighters' basic pay and premium pay. Similarly, *Zumerling* properly held that the regular rate is to be calculated based upon the total hours worked for the remuneration which, in the context of the facts of *Zumerling*, was correctly determined to be 144 hours.[5] However, based on my above

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[5] It is not clear whether the challenge to the overtime pay entitlements in the present case includes the situation where unscheduled or irregular overtime hours are worked. To the extent that it does, it would appear that only regularly scheduled hours should be used in the denominator of the calculation and that FPM Letter 551-5 should not include unscheduled overtime duty hours in the denominator. As noted in the legislative history accompanying the 1958 Amendments, premium pay was intended to compensate an employee only for those overtime hours within his regularly scheduled tour of duty and was not designed as compensation for unscheduled or irregular overtime worked in excess of the regularly scheduled work period. As noted in *Zumerling*, the Secretary of Labor provided that regular rate "is to be calculated 'by dividing

conclusions, I must disagree with the holding in *Zumerling* affirming the formula contained in FPM Letter 551-5 which entitles an employee to additional compensation at a rate of one-half times the "regular rate" for each hour that the employee's tour of duty exceeds the maximum hours limitation of 29 U.S.C. § 207(k).

Section 207(k) clearly mandates that a firefighter receive not less than one and one-half times his regular rate for each hour worked in excess of the maximum number of hours for the employee's work period calculated in accordance with that section. The number of hours entitled to compensation under section 207(k) and the method of calculating the applicable regular rate are not part of the present dispute. The remaining issue to be considered is how much of the pay already received by appellants can be attributed toward the required one and one-half times their regular rate that they are entitled to as compensation for the last 38 hours in their work period. In my opinion, the court's deference to OPM's interpretation is inappropriate in this area of dispute as well.

FPM Letter 551-5 asserts that the employee's total remuneration calculation compensates the employee at 100 percent for all the hours in his tour of duty and the additional one-half thereby allows the employee to receive one and one-half times the regular rate at which

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[the] total remuneration (except statutory exclusion) in any workweek [or work period] by the total number of hours actually worked by [the employee] in that workweek [work period] for which the compensation was paid.' " 769 F.2d at 752 (quoting 29 C.F.R. § 778.109). Unscheduled overtime hours beyond the firefighters' normal tour of duty are not hours for which the compensation (basic pay or premium pay) included in the numerator was paid and therefore should not be part of the denominator in the regular rate calculation. *Cf. Lanehart v. Horner*, 818 F.2d 1574, 1583 n. 17 (Fed.Cir. 1987) (finding Title 29 overtime pay for irregular overtime work outside of the normal scheduled work period not to be part of firefighters' customary and regular pay).

he or she is employed. *Zumerling* affirmed this method of calculation, finding that the firefighters "receive their regular pay for each of the 144 hours they work" and "[b]y receiving an additional [one-half][6] regular rate salary for overtime hours, their overtime compensation equals the statutorily mandated amount." 769 F.2d at 752-53. In reaching its conclusion, the *Zumerling* court found the OPM calculation to be consistent with the Secretary's regulations. *Id.* at 753.

In my opinion, none of the Secretary of Labor's regulations involving salaried workers, pieceworkers, day-rate workers, two-or-more-job workers, etc., cited by the court in *Zumerling* or the parties here are directly applicable to the situations involving federal employees receiving basic GS pay in accordance with 5 U.S.C. § 5504(b) and premium pay in accordance with 5 U.S.C. § 5545(c)(1). The premium pay system devised by Congress for firefighters is unique to the federal pay schedule. None of the Secretary's regulations covers a pay system involving two types of annual pay received for chronologically distinct hours of work. So, rather than attempt to discern the closest parallel from the myriad of regulations covering equally varied pay systems not part of the present facts, I prefer to look to the language chosen by Congress in the statutes covering this unique federal pay system to determine whether OPM's instructions in FPM Letter 551-5 are reasonable.

As described above, Congress has clearly indicated that the firefighters receive basic pay for the first 80 hours in their 144-hour work period and premium pay for the excess hours in their regularly scheduled work period. Therefore, under the pay system devised by Congress, the firefighters cannot be held to receive their regular rate for any of the hours worked in their work period

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[6] In the official Reporter, this was incorrectly described as "an additional one-hour regular rate salary." 769 F.2d at 753.

because their regular rate is merely a fictional rate utilized solely in calculating their overtime entitlement under the FLSA. Thus, while mathematically supportable, the additional one-half regular rate method employed by OPM is contrary to statute and must fall. *See Jeffrey*, 823 F.2d at 1531-32.

Since only premium pay is received for the hours in excess of 80 in their 2-week work period, appellants' position is that the government is only entitled to offset the amount of premium pay attributable to each of the last 38 hours from the one and one-half times regular rate due as compensation for those hours. In its attempt to discredit appellants' arguments, the government argues that the only time that the FLSA allows an employer to take a credit against an obligation to pay FLSA overtime pay is when the employer already is paying "extra compensation provided by a premium rate." *See* 29 U.S.C. § 207(h). Since the premium pay under 5 U.S.C. § 5545 (c)(1) has already been determined not to be a premium rate for the purposes of exclusion under section 207(e) from the regular rate calculation, the government's argument has arguable initial force, although perhaps not in the manner intended by the government.[7]

However, the language of section 207(k) makes it clear that the compensation due under that section for hours worked in excess of the maximum number is not a lump-sum figure, but a minimum amount below which the employee's compensation for those hours must not fall. *See* 29 U.S.C. § 207(k) (no violation of section if

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[7] Actually, the same argument appears to undermine the government's position in this appeal as well. Since the regular rate calculated for firefighters is a weighted average of the basic pay and premium pay received, neither of which is a premium rate under section 207(e), if the argument were accepted, the government also would be prevented from offsetting the regular rate derived from the "nonpremium" rates against the one and one-half times regular rate due under section 207(k).

employee receives "compensation at a rate not less than one and one-half times the regular rate at which he is employed"). Under 5 U.S.C. § 5545(c)(1), Congress has clearly provided premium pay as compensation for those hours worked in excess of 80 in the 2-week work period, including the 38 covered by the provisions of 29 U.S.C. § 207(k). As provided in FPM Letter 551-5, to the extent that the FLSA provides a greater overtime benefit to employees than does the benefit payable under Title 5, they are entitled to the FLSA benefit, but they are not entitled to combined benfits from both titles. *See Lanehart*, 818 F.2d at 1576. Since the amount received by appellants for each of the 38 hours in question under Title 5 is less than that provided in Title 29, they would be entitled to the greater figure, but not both amounts.

Nevertheless, my agreement with the appellants' central contention as to the meaning and application of section 5504(b) does not lead to adoption of their asserted computation mathematics for their overtime pay entitlements under 29 U.S.C. § 207(k). As stated above, I do not agree with the *Zumerling* conclusion that premium pay should be considered part of the wage received for every hour worked. Not surprisingly, this is one statement from *Zumerling* that went unchallenged by appellants since attributing premium pay to each hour worked rather than to the hours in excess of 40 each week would result in a higher recovery of appellants. Consistent with that view, I believe that the proper offset for appellants' premium pay already reecived should be 1/64th of the premium pay, not 1/144th of it as urged by appellants in light of *Zumerling*.

Thus, in order that appellants not receive compensation at a rate not less than one and one-half times their regular rate for the last 38 hours of their 144-hour work period, appellants should have received as their FLSA overtime compensation the difference between one and one-half times their regular rate and 1/64 of their pre-

mium pay for each of the 38 hours. Since they only received one-half times their regular rate for those hours, the amount owed them for each of the 38 hours would be the difference between their regular rate and 1/64th of their premium pay, subject to any proper adjustments not at issue in this appeal.

For the above reasons, I dissent from the majority opinion. As the government asserts that 29 U.S.C. § 259 shields it, as an employer, from any liability for back pay, I would remand the case to the district court for consideration of that issue including a determination of whether it properly was and remains before that court.[8] If it is, the merits of the government's asserted section 259 defense should be passed on by the district court before we make any statement on the subject.

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[8] 29 U.S.C. § 259 provides, in pertinent part:

> (a) In any action or proceeding based on any act or omission . . . no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay . . . overtime compensation under the Fair Labor Standards Act of 1938, as amended . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation of the [Administrator of the Wage and Hour Division of the Department of Labor] . . . . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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87-1138

RICHARD A. LAFORTE and RICKY A. ROGERS,
*Plaintiffs-Appellants,*

v.

CONSTANCE HORNER, DIRECTOR,
U.S. OFFICE OF PERSONNEL MANAGEMENT and the
UNITED STATES OF AMERCIA,
*Defendants-Appellees.*

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JUDGMENT

On Appeal from the United States District Court for the District of Maryland in Case No(s). Civil Action No. B-84-411

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

*AFFIRMED.*

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated Nov. 17, 1987

Issued as a Mandate: Dec. 23, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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Civil Action No. B-84-411

RICHARD A. LAFORTE and RICKY A. ROGERS

vs.

CONSTANCE HORNER, DIRECTOR,
U.S. OFFICE OF PERSONNEL MANAGEMENT and
UNITED STATES OF AMERICA

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Baltimore, Maryland

October 31, 1986

Before: His Honor, WALTER E. BLACK, JR.

ORAL OPINION OF THE COURT

APPEARANCES

For the Plaintiff:

Ira M. Lechner and Donald H. Feige

For the Defendant:

Robert Rutershan and Donna Helen Triptow

OPINION

THE COURT: Counsel, as I indicated to you I had already indicated my ruling in this regard, I do want to put something on the record for the benefit of counsel if in future proceedings in this matter, and I will do so by means of a very informal oral opinion. Reserving the right to edit that opinion if it is transcribed without in any way changing the result or the essential meaning.

The two plaintiffs in this action are or were federal employees engaged in fire protection activities for Andrews Air Force Base in Maryland. Mr. LaForte worked as a fire fighter from August 15th, 1983, to October 27th, 1984, and Mr. Andrews is still so employed at Andrews since August 15th, 1983. The defendants are Ms. Constance Horner, acting essentially as director of the Office of Personnel Management, and the United States government. In their second amended complaint the plaintiffs allege that since the date of their employment they have been paid at a rate less than the "one and one-half times the regular rate" for overtime hours required by the Fair Labor Standards Act.

The plaintiffs have requested the following relief:

That the Court enter a declaratory judgment with respect to the appropriate computation of the overtime wages pursuant to the FLSA;

That the defendants make a full and accurate accounting of all wages or overtime compensation due each plaintiff with the Court, and that the Court enter judgment accordingly pursuant to Section 16(a) of the FLSA;

That the Court award appropriate interest and attorneys' fees to the plaintiffs; and,

That the Court grant any other relief deemed to be necessary and proper.

This case now comes before the court on Cross Motions for Summary Judgment which, upon resolution, will effectively dispose of all issues presented by these parties. A motion for summary judgment can only be granted under the Federal Rules of Civil Procedure Rule 56 if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Poller Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962). The Court agrees that there are no genuine issues of fact and, therefore, is able to resolve the case on the narrow legal issue presented.

The only issue the Court finds pertinent for disposition of this case is whether it is bound by the decision of the Court of Appeals for the Federal Circuit in Zumerling versus Devine, 769 F2d 745 (1985). Writing for the Court was senior Circuit Judge Nichols who stated that the issue in Zumerling was whether

> "OPM has properly applied section 7(k) of the Fair Labor Standards Act . . . in formulating its equation for the calculation of overtime payments for federal firefighters . . ."

That is a quote from page 746.

The Zumerling court found that the calculation by OPM was "both reasonable and consistent the FLSA." At page 749. This Court finds that the issue presented in this case is identical to that in Zumerling and that the result reached by that court was correct. Consequently, the Court finds no persuasive reason not to abide by that decision, especially in the light of the fact that any appeal of this decision by the parties will indeed go to the Court of Appeals for the Federal Circuit. Accordingly, having read the briefs and upon hearing oral argument this afternoon the Court will deny the plaintiff's Motion for Summary Judgment, paper 14, and grant the Cross Motion for Summary Judgment as filed by the defendants, paper 16. The Court will, however, address the concerns raised by the plaintiffs as to the validity of the Zumerling decision with respect to the specific circumstances of this case.

The focus of the inquiry in this Court and the Zumerling court was the last sentence contained in section 207 (k) which reads, in pertinent part, that overtime work is to be compensated "at a rate not less than one and one-half times the regular rate at which the firefighter is employed". The firefighters employed by the United States government receive annual G.S. "basic pay"; "premium pay" (to compensate firefighters for the fact that they

don't work the typical work schedule of the federal system); and overtime pay. To figure out the amount of overtime pay owed to a firefighter there must be first a determination as to of the regular rate. The Court understands that the formula used to compute the regular rate is not at issue in this case. The regular rate equals the total renumeration (defined as basic pay plus "standby" premium pay) divided by the total hours worked (scheduled and nonscheduled) during the work period. Firefighters generally work a 72 hour week and get paid biweekly for 144 hours. This fact is not in dispute, nor is the fact that a 144 is the proper demoninator when calculating the regular rate for overtime purposes. For all intents and purposes the number of overtime hours that these firefighters generally work is 38 because the statutory minimum number of hours which firefighters must work before overtime pay is warranted has been set at 53 hours in a seven day work period versus the 40 hour week which governs most employees. Once the regular rate has been calculated, "one and one-half times" that amount is multiplied by the number of overtime hours worked, for example, by 38.

OPM has determined, and the Zumerling court has by implication supported that determination, that the appropriate multiplier is really "one-half" the regular rate times the number of overtime hours worked rather than "one and one-half". Support for this method of computation is found in the Supreme Court's opinion in Bay Ridge Operating Co., Inc. versus Aaron, 334 U.S. 446 (1948). Quoting:

> "In computing the amount to be paid, (employers) may credit against the obligation to pay statutory excess compensation (overtime pay) the amount already paid to each employee which is allocable to work in those excess hours."

A quote from page 476. For example, in this context if an employer has already paid its employee basic pay

for working 144 hours, it should be able to "credit" against obligation to pay 38 hours of overtime overlapping those 144 hours (144 less the statutory maximum of 106), the basic pay allocable to those 38 hours. Justification for this analysis was offered by OPM in its attachment two to the letter 551-5:

> "*NOTE*: The employee's additional compensation for overtime work is computed at *one-half* times the 'regular rate' and not *one and one-half* times the regular rate for all overtime hours under the FLSA. A simple explanation is that in computing an employee's total renumeration for the work period, the employee has already been compensated a hundred percent for all hours in his tour of duty. Therefore, once the employee's 'regular rate' is computed, the employee is thus entitled to additional compensation of 50 percent times his 'regular rate' for those hours in excess of the maximum hours limitations of Section 7(k) of the FLSA. This method of computing an employee's overtime entitlement under the FLSA results in the employee being compensated for overtime work at a rate of 'one and one-half times the regular rate at which he is employed.'"

The crux of the plaintiff's position in Zumerling was that OPM incorrectly divided the total renumeration by the total hours by which it is received (144 hours). Citing Zumerling at page 750. It was their argument that the correct divisor was 80 hours or alernatively 108 hours (which was the statutory nonovertime hours at the time of that decision) at pages 751 and 2. On the contrary, the plaintiffs in this case do not dispute this portion of the regular rate computation. Instead, they rely on the argument that because basic pay is not for 144 hours work week, two weeks, but rather for an 80 hour two weeks, "none of the firefighters basic pay may be used as an offset or as a 'credit against the obligation to pay statutory excess compensation . . .' because none of basic

pay is allocable to any of the overtime hours." Citing the plaintiff's motion at page 9. They conclude that firefighters have not been paid one and one-half times the regular rate then because the government cannot credit 38 hours of basic pay as having already been paid at the regular rate. At the outset, the Court notes that plaintiffs' argument is internally inconsistent in any event because it is self evident that "total renumeration" equals basic pay plus premium pay, therefore, it is illogical to find that basic pay for firefighters is only for 80 hours work and not for the total hours worked, that number being 144. Plaintiffs apparently do not disagree that "standby" premium pay is indeed allocable to the 38 hours and available as a credit against the government's obligation to pay overtime wages. Referring to the Plaintiffs' motion at page seven.

In support of their argument, the plaintiffs offer various factors that they allege the Zumerling court either did not or could not have considered in their decision. This, plaintiffs say, resulted in an erroneous opinion, or at the very least, an opinion not binding on the Court in the circumstances they are faced with here. Each factor is offered to support the premise that no portion of a firefighter's basic pay is deemed payment for any of the overtime hours they work in each pay period. Plaintiffs contend that basic G.S. pay is payment for only 80 hours of work biweekly and not for 144 hours of work.

Only two of plaintiffs' arguments are worthy of consideration here. First, plaintiffs' point to language in Title V of the United States Code regarding the compensation of pay that,

> "the annual rate of basic pay established by or under statute is deeded payment for employment during 52 basic administrative workweeks of 40 hours."

That being a quote from 5 United States Code Section 5504(b).

The Court is not persuaded by this language. First, as defendants have correctly pointed out, this sentence in Section 5504(b) has been repealed, but this may not have any particular significance in light of the portion of the section which remains. Moreover, 5504(b) was promulgated to enable employees to compute their annual rate of basic pay to a "basic hourly, daily, weekly, or biweekly rate" only and is not a factor in determining the "regular rate". Firefighters are paid a certain basic pay based on 144 hour work week and their compensation is not based on an 80 hour work week as plaintiffs suggest. And the Court would refer to the opinion in Zumerling v. March 591 F.Supp. 537, at 548 in the Western District of Pennslvania in 1984, which opinion clearly shows that the application of the statute was considered in the Zumerling litigation. Section 5504(b) is simply not relevant to a determination of overtime wages.

For similar reasons, plaintiffs' argument that the government has admitted that firefighters "are deemed to receive payment of their annual rate of G.S. basic pay for employment during 52 basic administrative work weeks of 40 hours" must also fail. First, clearly the government was repeating, almost verbatim, the language of Section 5504(b) and the Court has already determined that 5504(b) is not pertinent here. Plaintiff refer to this admission as one of "fact" and thereby attempt to differentiate this case from that in Zumerling where such a fact was not presented to the Court.

The Court is not at all sure that this admission is one of fact but rather a conclusion of law based on the government's reading of 5504(b) and taken out of context by the plaintiffs. Since the so-called admissions add nothing to the language of Section 5504(b) it makes no difference to the posture of either this case or Zumerling whether the government has made such an admission.

As the Court finds that the Zumerling court satisfactorily laid to rest the concerns of firefighters regarding

their overtime pay, it will not reopen the issue by readdressing the substantive questions raised by plaintiffs' Motion for Summary Judgment. As plaintiffs' interpretation as to the validity of Zumerling as binding precedent in this case and on this Court is incorrect, defendant's argument that their claims for retroactive pay would have been barred by 29 United States Code, Section 259, need not be addressed. Therefore, in accordance with the principle set forth in Zumerling, the Court holds that OPM's calculation of overtime, as mandated by the FLSA is properly determined by multiplying one-half of the "regular" rate times the number of hours overtime worked. By receiving one-half additional pay, the firefighter does receive in total one and one-half times the regular rate at which he is employed. Citing Zumerling, again, 769 F2d at 752.

So the Court will enter an order granting the defendant's Cross Motion for Summary Judgment and denying the plaintiffs Motion for Summary Judgment.

And with that I will send you all on your way to the next court.

MR. LECHNER: Thank you.

MR. RUTERSHAN: Thank you, Your Honor.

(Hearing concluded.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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Civil Action No. B-84-411

RICHARD A. LAFORTE and RICKY A. ROGERS

v.

CONSTANCE HORNER, Director,
U.S. Office of Personnel Management and
UNITED STATES OF AMERICA

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## ORDER AND JUDGMENT

Presently pending are the litigants' cross-motions for summary judgment—Plaintiffs' Motion for Summary Judgment (Paper 14) and Defendants' Motion for Summary Judgment (Paper 16). A responsive Reply Brief has been filed on plaintiffs' behalf, and the Court has had the benefit of oral argument on behalf of the parties at a hearing herein on October 31, 1986. In accordance with the Court's oral opinion rendered at the conclusion of said hearing, IT IS, this 3rd day of November, 1986, ORDERED and ADJUDGED as follows:

1. That Plaintiffs' Motion for Summary Judgment (Paper 14) BE, and the same hereby IS, DENIED;

2. That Defendants' Motion for Summary Judgment (Paper 16) BE, and the same hereby IS, GRANTED;

3. That judgment BE, and the same hereby IS, ENTERED in favor of defendants, Constance Horner, Director, U.S. Office of Personnel Management, and the United States of America, against the plaintiffs, Richard A. LaForte and Ricky A. Rogers; and,

4. That the Clerk shall transmit copies of this Order and Judgment to counsel of record for the parties to this action.

/s/ Walter E. Black, Jr.
WALTER E. BLACK, JR.
United States District Judge

THE COMPTROLLER GENERAL
OF THE UNITED STATES

Washington, D.C. 20548

[SEAL]

DECISION

DATE: March 13, 1985

File: B-216640

Matter of: Frederick Evans, Jr.—Computation of Pay for Firefighters

Digest:

1. Union of federal firefighters claims that their basic pay should be computed on the basis of their 144-hour tour of duty times their hourly wage. However, under the statutes and regulations, federal firefighters are entitled to basic pay for 80 hours biweekly plus premium pay for standby duty under title 5, United States Code. Decisions of our Office and the courts recognize that part of these 144-hour tours of duty involve noncompensable eating and sleeping time.

2. Union of federal firefighters seeks extension of our decision involving Fair Labor Standards Act (FLSA) overtime and court leave to apply also to annual and sick leave. Our decision in 62 Comp. Gen. 216 (1983) held that FLSA overtime may not be reduced during periods of court leave, but that rationale does not extend to annual or sick leave.

ISSUES

The first issue in this decision involves the computation of basic pay for federal firefighters who work a 144-hour tour of duty biweekly. We hold that such firefighters may not be compensated on the basis of 144 hours times

their hourly wage since the existing statutes provide for compensation on the basis of 80 hours times the hourly wage plus premium pay for standby duty.

The second issue involves whether annual and sick leave may be treated the same as court leave for the purposes of overtime under the Fair Labor Standards Act (FLSA). Although we held that FLSA overtime may not be reduced during periods of court leave, that same rationale does not apply to annual or sick leave which are not considered "hours of work" under the FLSA.

## BACKGROUND

This decision is in response to a request from Frederick Evans, Jr., President, Local F-100, International Association of Fire Fighters, Newport Naval Base, Newport, Rhode Island. The request was processed under our labor-management procedures contained in 4 C.F.R. Part 22 (1984), and while we received no comments from the Department of the Navy, we requested and received comments on this matter from the Office of Personnel Management (OPM).

*Union argument*

Mr. Evans states that firefighters at the Newport Naval Base work a regularly scheduled 144-hour tour of duty every 2 weeks. However, he argues that the Navy computes basic pay on the basis of an 80-hour biweekly pay period, and thus firefighters are not compensated for the additional 64 hours (144-80) they work every 2 weeks. He contends that basic pay should be computed on the basis of 144 hours times the employee's hourly rate, instead of the agency's method of 80 hours times the hourly rate.

*OPM position*

The report from OPM states that federal firefighters are entitled to overtime under two laws, title 5, United States Code, and the FLSA. The report continues that

under title 5, firefighters are compensated in a manner different than most General Schedule employees who work a 40-hour workweek. As noted by Mr. Evans, firefighters have a 72-hour per week tour of duty, consisting of three 24-hour shifts, and OPM points out that during each 24-hour shift, 8 hours are considered actual work and 16 hours are treated as standby. The OPM report continues by stating that firefighters receive basic pay and annual premium pay for regularly scheduled standby duty (normally 25 percent) under section 5545(c)(1) of title 5, United States Code. This standby pay is in lieu of premium pay for regularly scheduled night, Sunday, and holiday work, except for irregular, unscheduled overtime duty in excess of the employee's regularly scheduled weekly tour. In addition, the OPM report points out that the standby pay is considered to be basic pay for the purposes of severance pay, compensation for work injuries, and life insurance.

## OPINION

We know of no basis to allow the union's claim. Under the provisions of 5 U.S.C. § 6101 (1982), heads of agencies may establish the administrative workweek, which permits the establishment of this 72-hour workweek. See also 5 C.F.R. Part 610 (1984). In addition, under subchapter V of chapter 55, title 5, United States Code, the Congress has provided for the payment of overtime or premium pay for work in excess of 40 hours in an administrative workweek.

As noted in the OPM report, 5 U.S.C. § 5545(c)(1) provides premium pay up to 25 percent to an employee "* * * in a position requiring him regularly to remain at, or within the confines of his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work * * *." This method of compensating federal firefighters has long been recognized in decisions

of this Office [1] and the court.[2] For an example of the calculation of overtime pay for firefighters, see 55 Comp. Gen. 908, 910.

As we pointed out in our decision in 25 Comp. Gen. 161 (1945), we recognized the adoption of the so-called "two-thirds rule;" that is, for assignments of 24 hours or more, one-third of the time represents time for eating and sleeping and need not be regarded as hours of employment for the purposes of title 5, United States Code. See *Thomas A. Donohue*, B-213886, October 2, 1984, 64 Comp. Gen. 1.

A change in the 72-hour workweek for federal firefighters was passed by the Congress in 1978 but vetoed by the President. The bill, H.R. 3161, would have amended chapter 61 of title 5 to reduce the workweek of federal firefighters from 72 hours to 56 hours, and in its consideration of the bill, the Congress took no exception to the then-existing and still-current method of compensating federal firefighters under title 5, United States Code.[3]

We note that federal firefighters are also entitled to overtime under the FLSA for duty hours in excess of 106 hours in a biweekly work period. See 62 Comp. Gen. 216, cited above, and 55 Comp. Gen. 908 (1976). See also Federal Personnel Manual Letter 551-20, September 22, 1983. However, Mr. Evans has not objected to the computation of overtime under the FLSA, so we need not discuss this entitlement further.

In view of the above discussion, we hold that the basic pay of federal firefighters is properly computed, and we

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[1] See 62 Comp. Gen. 216 (1983); 55 Comp. Gen. 908 (1976); and 25 Comp. Gen. 161 (1945).

[2] See *Bean v. United States*, 175 F. Supp. 166 (Ct. Cl. 1959); and *Collins v. United States*, 141 Ct. Cl. 573 (1958).

[3] Cong. Rec. 9915-22 (daily ed. April 12, 1978); Cong. Rec. 16242-43 (daily ed. June 5, 1978); and Cong. Rec. 183112-12 (daily ed. June 21, 1978).

deny the union's claim that basic pay should be computed on the basis of 144 hours times the employee's hourly rate.

*FLSA Overtime for Leave*

*Union position*

In his second contention, Mr. Evans points out that under our decision in 62 Comp. Gen. 216 (B-207710), federal firefighters who are on court leave continue to receive overtime pay under the FLSA. He argues that this decision should be excluded to include annual leave and sick leave since 5 U.S.C. § 6302(a) provides that days of leave are days on which an employee would otherwise work and receive pay, exclusive of holidays and nonworkdays.

*OPM position*

The report from OPM points out that periods of nonwork (leave, holidays, or excused absences) are not hours of work for the purposes of the FLSA. 5 C.F.R. § 551.401(b); *Louis Pohopek*, 60 Comp. Gen. 493 (1981); and *R. Elizabeth Rew*, 55 Comp. Gen. 1035 (1976). As to the issue of FLSA overtime for periods of court leave or military leave, the OPM report notes that this issue is currently being litigated in federal court.[4]

*Opinion*

As noted by the OPM report, we have held that periods of nonwork such as annual leave or sick leave are not considered to be "hours of work" for the purposes of the FLSA. *Pohopek* and *Rew*, cited above. Furthermore, our decision in 62 Comp. Gen. 216 regarding court leave did not treat such leave as "hours of work" under the FLSA. Rather, we pointed out that section 6322 of title 5, United

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[4] *Lanehart v. Devine*, C.A. No. Y-83-3543 (D. Md.); and *Davila v. Weinberger*, C.A. No. 83-3910 (D.D.C.).

States Code, provide leave for jury duty without reduction or loss of pay to which otherwise entitled. Therefore, we held that the FLSA overtime entitlement of firefighters may not be reduced during absence for court leave.

We know of no basis to extend this decision to apply to annual leave or sick leave since those sections of title 5 (6303, 6304, and 6307) do not contain the same language protecting against loss or reduction in pay as is contained in section 6323 (miiltary leave). Therefore, we hold that absences for annual or sick leave do not constitute "hours of work" for the purposes of the FLSA.

for /s/ Milton J. Dorolan
Comptroller General
of the United States

THE COMPTROLLER GENERAL
OF THE UNITED STATES

Washington, D.C. 20548

[SEAL]

DECISION

DATE: September 18, 1985

File: B-216640

Matter of: Reconsideration of Frederick Evans, Jr.—Pay for Firefighters

Digest:

1. Union of federal firefighters requests reconsideration of prior decision holding they are entitled to basic pay for 80 hours biweekly plus premium pay for the remainder of their 144-hour tour of duty. Under the applicable statutes and regulations, firefighters are not entitled to basic pay for their entire 144-hour tour of duty.

2. Union of federal firefighters requests reconsideration of prior decision concerning reduction of overtime under Fair Labor Standards Act (FLSA) for periods of annual or sick leave. Regulations cited by union concerning overtime for periods of annual or sick leave apply to overtime under title 5, United States Code, not to overtime under the FLSA, a separate statutory authority.

ISSUES

The first issue in this decision involves the computation of basic pay for federal firefighters who work a 144-hour tour of duty during a 2-week period. We sustain our prior decision holding that firefighters are compen-

sated for 80 hours times their basic wage plus overtime or premium pay for hours in excess of 80 hours.

The second issue involves whether annual and sick leave may reduce the employee's entitlement to overtime. We hold that although such absences do not affect overtime entitlement under title 5, United States Code, such absences are not considered "hours of work'" under the Fair Labor Standards Act.

## BACKGROUND

This decision is in response to a request from Frederick Evans, Jr., President, Local F-100, International Association of Fire Fighters, Newport Naval Base, Newport, Rhode Island. Mr. Evans requests reconsideration of our decision in *Frederick Evans, Jr.*, B-216640, March 13, 1985, concerning the computation of pay for Federal firefighters.

In our prior decision, we held that under the applicable statutes and regulations, federal firefighters are entitled to basic pay for 80 hours biweekly plus premium pay for standby duty under title 5, United States Code. We denied the union's claim that the basic pay of firefighters should be computed on the basis of their 144-hour tour of duty times their hourly wage. In addition, we held that absences for annual leave or sick leave do not constitute "hours of work" under the Fair Labor Standards Act (FLSA) and, therefore, such absence will reduce an employee's overtime entitlement under the FLSA.

In the request for reconsideration, the union again argues that their regularly scheduled administrative workweek is 144 hours but that they are paid for only 80 hours, citing provisions of the Federal Personnel Manual (FPM). The union also argues that the "two-thirds rule" which permits deduction of eating and sleeping

time is not applicable to firefighters who receive premium pay for stand-by duty under 5 U.S.C. § 5545(c)(1). Finally, the union cites various provisions of the FPM stating that overtime shall not be reduced by absences for annual leave or sick leave.

## DISCUSSION

As we stated in our prior decision, we know of no basis to allow the union's claim that these employees be compensated on the basis of their 144-hour tour of duty times their hourly wage.

Title 5 of the United States Code provides that when an employee works more than 40 hours in an administrative workweek or more than 8 hours in a day, the employee shall be compensated by overtime or premium pay. See 5 U.S.C. §§ 5542, 5544, and 5545 (1982). We are unaware of any statute which authorizes the payment of basic pay in excess of 40 hours in an administrative workweek.

As we cited in our prior decision, section 5545(c)(1) of title 5, United States Code, provides premium pay up to 25 percent to an employee "* * * in a position requiring him regularly to remain at, or within the confines of his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work * * *." We also stated that this method of compensating Federal firefighters has long been recognized in decisions of this Office and the courts.

The union cites provisions of the FPM which state that when an employee is paid additional pay under section 5545(c)(1), the employee's regularly scheduled administrative workweek is the total number of regularly scheduled hours of duty a week. But the length of the administrative workweek does not allow the employee to receive basic pay for hours of work in excess of 40

hours per week. As we stated above, basic pay for purposes of title 5, United States Code, is payable for up to 40 hours of work per week, and hours in excess of 40 are compensable by means of overtime or premium pay. Simply put, the hours in excess of 80 hours every two weeks are being compensated, not by means of basic pay but rather through premium pay. See 5 C.F.R. §§ 550.141-550.144. The purpose for establishing the regularly scheduled administrative workweek is to determine whether there is irregular, unscheduled overtime duty in excess of the employee's regularly scheduled weekly tour which will be compensated at overtime rates. See 5 U.S.C. § 5545(c)(1), and House Report No. 1870, 85th Cong. 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Ad. News 3047, 3048.

With regard to the union's statement that the two-thirds rule is not applicable to an employee receiving premium pay under 5545(c)(1), we agree with respect to the employee's regularly scheduled workweek. The provisions of section 5545(c)(1) were adopted in 1954 with the intention of replacing the two-thirds rule. See the discussion in *Bean v. United States*, 175 F. Supp. 166 (Ct. Cl. 1959). However, the two-thirds rule may still be applied to a firefighter in determining entitlement to compensation for irregular overtime in excess of the regularly scheduled workweek. See *Thomas A. Donohue*, B-213886, October 2, 1984, 64 Comp. Gen. 1.

Finally, we note that the union cites various provisions of the FPM concerning the payment of overtime during periods of annual leave or sick leave. We agree with the union that for purposes of title 5, United States Code, leave with pay such as annual leave or sick leave is deemed employment and does not reduce the amount of overtime pay to which an employee is entitled during an administrative workweek. See 5 C.F.R. § 550.112(c).

However, these regulations do not govern overtime computed under different statutory authority, the FLSA.

See 29 U.S.C. §§ 201-219 (1982). Such absences for leave or holidays do not constitute "hours of work" under the FLSA. See 5 C.F.R. § 551.401(b). See also *Louis Pohopek*, 60 Comp. Gen. 493 (1981); and *R. Elizabeth Rew*, 55 Comp. Gen. 1035 (1976). Therefore, we sustain our prior decision that annual or sick leave does not constitute "hours of work" for the purposes of FLSA overtime.

Accordingly, for the reasons stated above, we sustain our prior decision.

/s/ Milton J. Dorolar
Acting Comptroller General
of the United States

1.

COMPENSATION
Overtime
Firefighting
Two-thirds rule application

COMPENSATION
Overtime
Irregular, unscheduled
Firefighting assignments

COMPENSATION
Overtime
Two-thirds rule application

LABOR-MANAGEMENT RELATIONS
Federal service
Requests for GAO decisions, etc.

2.

COMPENSATION
Overtime
Firefighting
Fair Labor Standards Act
Entitlement

COMPENSATION
Overtime
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Standby, etc. time
Criteria for entitlement
Claim denied

LABOR-MANAGEMENT RELATIONS
Federal service
Requests for GAO decisions, etc.

PLAINTIFFS EXHIBIT 1(d)

UNITED STATES CIVIL SERVICE COMMISSION

FEDERAL PERSONNEL MANUAL SYSTEM

LETTER

Washington, D.C. 20415
January 15, 1975

FPM Letter No. 551-5

Subject: Instructions for Applying the Fair Labor Standards Act (FLSA) to Federal Employees Engaged in Fire Protection Activities or Law Enforcement Activities

*Heads of Departments and Agencies:*

This is another in a series of FPM letters pertaining to the Fair Labor Standards Act as was mentioned in FPM Letter 551-1, May 15, 1974.

The Department of Labor regulations for applying the FLSA to employees engaged in fire protection activities or law enforcement activities in public agencies under its administrative authority are contained in part 553 of title 29, Code of Federal Regulations. The instructions contained in this FPM Letter pertain to Federal employees engaged in fire protection activities or law enforcement activities under the administrative authority of the Civil Service Commission as provided in section 4(f) of the FLSA, as amended. The contents of this FPM Letter have been coordinated with the Department of Labor and, where relevant, common language has been used in the Commission and the Department of Labor instructions to ensure the maximum possible uniform application of the FLSA to all employees in public agencies engaged in these activities.

1. *Introduction*

The Fair Labor Standards Amendments of 1974 (Public Law 93-259) provide a special exemption and a special overtime provision for employees engaged in fire protection activities or law enforcement activities under section 13(b)(20) and 7(k) of the Fair Labor Standards Act (FLSA), as amended.

INQUIRIES:

(1) Bureau of Policies and Standards, Pay Policy Division, code 101, ext. 25604 or 63-25604 (on pay entitlements)

(2) Bureau of Policies and Standards, Standards Division, code 101, ext. 25612 or 63-25612 (on exemptions and definitions of fire protection activities and law enforcement activities)

CSC CODE 551, Pay Administration Under the Fair Labor Standards Act

DISTRIBUTION: FPM (Advance edition limited)

2. *Definitions of "Fire Protection Activities" and "Law Enforcement Activities*

Attachment 1 to these instructions defines the functions and kinds of employees included or excluded under the terms "fire protection activities" or "law enforcement activities" as these terms are used in the FLSA.

3. *Applicable Provisions of the FLSA*

Those provisions of the FLSA that apply to employees engaged in fire protection activities or law enforcement activities are contained in attachment to these instructions. Included in this attachment are the exemptions provided in the FLSA, the overtime provisions in the FLSA that apply to these employees, the definition of "tour of duty" what constitutes "hours of work" under

the special overtime provision of section 7(k) of the FLSA, and an explanation of how to compute an employee's overtime pay entitlement under section 7(k) of the FLSA.

4. *Applicable Provisions of Title 5, United States Code*

Those provisions of title 5 that pertain to employees engaged in fire protection activities or law enforcement activities are contained in attachment to these instructions. Included in this attachment is a discussion of the different overtime pay provisions that apply to these employees under title and a discussion of the term "tour of duty" and what constitutes "hours of work" under title 5.

5. *Overtime Pay Entitlements—Title 5 versus FLSA*

Title 5 provides Federal employees certain pay entitlements for overtime. Section 7(k) of the FLSA establishes a minimum standard for entitlement to overtime pay for employees covered by this special overtime provision. T— individual application of these laws could result in different pay treatment for covered employees. To the extent that the FLSA would provide a greater *overtime* pay benefit to these employees than the benefit payable under title 5 the employee is entitled to the FLSA benefit. If title 5 provides a greater *overtime* pay benefit, of course, the employee continues to receive that benefit.

4. *Overtime Pay Computations under Various Work Schedules*

Attachment 4 to these instructions contains examples of overtime pay computations under various combinations of work periods and tours of duty. These examples illustrate the method for computing "tours of duty" and overtime pay entitlements under both title 5 and FLSA, and the resulting differences in pay treatment for typical

employee situations, and how to determine which statute (title 5 or FLSA) provides the employee the greater *overtime* pay benefit.

/s/ Bernard Rosen
BERNARD ROSEN
Executive Director

Attachments

Attachment 2 to FPM Ltr. 551-5

# APPLICABLE PROVISIONS OF THE FLSA PERTAINING TO EMPLOYEES ENGAGED IN FIRE PROTECTION ACTIVITIES OR LAW ENFORCEMENT ACTIVITIES

## A. *Exemptions Provided in the FLSA*

### 1. *General Exemption in Section 13(a)(1) of the FLSA for Bona Fide Executive, Administrative, and Professional Employees*

Section 13(a)(1) of the FLSA, as amended, which exempts executive, administrative, and professional employees, applies to employees in fire protection activities and law enforcement activities on the same basis as it applies to other occupations. *This exemption should be applied first,* to identify any exempt executive, administrative, or professional employees. Further consideration is required only for those employees who are *non-exempt* under section 13(a)(1) of the FLSA.

### 2. *Special Exemption in Section 13(b)(20) of the FLSA for Employees of a Public Agency Who are Engaged in Fire Protection Activities or Law Enforcement Activities*

The FLSA provides special overtime treatment for employees engaged in fire protection activites or law enforcement activities. First, all of these employees were temporarily exempted from the overtime provisions of the FLSA for the period May 1, 1974, through December 31, 1974. Second, effective January 1, 1975, this exemption applies permanently in small agencies having fewer than five employees engaged in either fire protection activities or in law enforcement activities. This exemption is contained in section 13(b)(20) of the FLSA, as amended. Third, effective January 1, 1975, the law pro-

vides special overtime treatment for employees who are *nonexempt* under section 13(a)(1) of the FLSA and who are *nonexempt* under section 13(b)(20) of the FLSA. This special overtime provision of section 7(k) of the FLSA, is discussed in B below.

B. *Overtime Provisions in the FLSA*

1. *Special Overtime Provision in Section 7(k) of the FLSA for Employees Engaged in Fire Protection Activities or Law Enforcement Activities*

Section 7(k) of the FLSA, as amended, provides that *nonexempt* employees engaged in fire protection activities or law enforcement activities shall be compensated at a rate not less than one and one-half times the regular rate at which they are employed if their "tour of duty" exceeds:

a. 240 hours in a work period of 28 days (60 hours in a work period of seven days or in the case of any work period between seven and 28 days, a proportionate number of hours in the work period) beginning January 1, 1975.

b. 232 hours in a work period of 28 days (58 hours in a work period of seven days or in the case of any work period between seven and 28 days, a proportionate number of hours in this work period) beginning January 1, 1976, or

c. 216 hours in a work period of 28 days (54 hours in a work period of seven days or in the case of any work period between seven and 28 days, a proportionate number of hours in this work period) beginning January 1, 1977, and thereafter; except that if on the basis of separate studies to be conducted of the average 1975 duty hours of fire protection and law enforcement personnel that these average duty hours are lower than 216 hours in a work period of 28 days, then these lower duty hours shall be effective January 1, 1978, and thereafter.

*NOTE*: This special overtime provision does not require Federal agencies to reduce the number of hours in the "tour of duty" for employees in these activities, but requires that agencies compensate these employees at an overtime rate for all hours in the "tour of duty" that exceed the maximum hours limitation specified in section 7(k) of the FLSA.

2. *Basic Overtime Provision in Section 7(a) of the FLSA*

*Nonexempt* employees engaged in fire protection activities or law enforcement activities who are *not* included under the special overtime provision of section 7(k) of the FLSA are entitled to additional compensation for all hours actually worked in excess of 40 in a workweek under section 7(a) of the FLSA. The rules for determining hours of work contained in FPM Letters 551-1 through 551-4 (and subsequent instructions to be issued by the Civil Service Commission on the FLSA) for employees subject to the basic overtime provision of the FLSA shall apply.

C. *Tour of Duty and Hours of Work Under Section 7(k) of the FLSA*

1. *General Statement*

In extending the coverage of the FLSA to employees engaged in fire protection activities or law enforcement activities, Congress was aware that the work schedules of these employees vary from the work schedules of other employees, and clearly recognized that some adjustment would have to be made in the usual rules for determining hours of work in their case. Thus, Congress departed from the standard "hours of work" concept and adopted an overtime standard keyed to the length of the "tour of duty". In addition, Congress also adopted a new work period concept which may be used instead of the usual workweek basis for determining overtime hours.

2. *Tour of Duty*

The term "tour of duty," as used in section 7(k) of the FLSA, means the period during which an employee is on duty. It may be a scheduled or unscheduled period. Scheduled periods refer to shifts, i.e., the period of time which elapses between scheduled arrival and departure times (as in the case for example, of a firefighter who has a scheduled 24 hour shift from 8:00 a.m. one morning until 8:00 a.m. the next morning; or in the case for example, of a criminal investigator who has a scheduled eight and one-half hour shift from 8:30 a.m. until 5:00 p.m. the same day), or to scheduled periods outside the shift (as in the case for example, of a special detail involving crowd control during a parade or other such event). Unscheduled periods refer to time spent by employees on duty outside their scheduled shift (for example; time spent by firefighters fighting a fire outside their scheduled shift, time spent by police officers in court outside their scheduled shift, time spent by criminal investigators shadowing a suspect in continuation of their scheduled shift, or time spent by employees after a shift in order to complete required work). When an employee is actually on duty fewer hours than those specified in his scheduled shift, the employee's tour of duty is reduced accordingly.

3. *Work Period*

a. *Establishment of Work Periods.* Each agency is responsible for establishing the work period to be used for scheduling employees included under section 7(k) of the FLSA. The work period shall be at least seven days and not more than 28 days. If an agency establishes a work period of less than 28 days, the maximum number of hours in the tour of duty before the requirement to pay overtime shall be proportionate to the appropriate maximum number of hours requirement for the 28-day work period in effect for that calendar year. For exam-

ple, during calendar year 1975 the agency may establish a 28-day work period with 240 hours as the maximum number of hours before the requirement to pay overtime, a 14-day work period with 120 hours as the maximum number of hours before the requirement to pay overtime, a 7-day work period with 60 hours as the maximum number of hours before the requirement to pay overtime, etc.

An agency which uses employees in activities other than those included in the definitions contained in attachment 1 to perform fire protection or law enforcement duties during an emergency situation shall apply the seven day work period for determining the percentage of total hours worked by these employees in fire protection of law enforcement duties and for applying the special overtime provision of section 7(k) of the FLSA.

b. *Establishment of a Regularly Scheduled Tour of Duty.* Each agency is responsible for establishing a regularly scheduled tour of duty for the work period for employees included under section 7(k) of the FLSA. An agency may include regularly scheduled overtime in this tour of duty.

4. *Sleeping and Meal Time*

a. *Duty of 24 Hours or Less.* Sleep and meal time shall *not* be excluded from hours worked in the case of any employee engaged in fire protection activities or law enforcement activities when the employee is required to be on duty for 24 hours or less.

b. *Duty of More Than 24 Hours.* Sleep and meal time may, however, be excluded in the case of fire protection or law enforcement employees who are on duty for more than 24 hours, but only if the employer and the employee have agreed to exclude this time. In the absence of any agreement, sleep and meal time shall constitute hours of work. If, on the other hand, the agreement provides for

the exclusion of sleep time, the amount of this time shall, in no event, exceed 8 hours, which is also the amount of time permitted when the agreement fails to specify the duration of sleep time. If the sleep time is interrupted by a call to duty, the interruption shall be counted as hours worked, and if the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (at least five hours), the entire time shall be counted as hours of work.

5. *General Rules for Hours of Work*

The general rules for determining hours of work remain in effect, except as modified in paragraphs 2 through 4 above. These general rules are contained in FPM Letters 551-1 through 551-4 (and subsequent instructions to be issued by the Civil Service Commission on the FLSA).

*NOTE*: The rules for determining tour of duty, work period, and hours of work in paragraphs 2 through 4 above apply only to employees engaged in fire protection activities or law enforcement activities under the special overtime provision of section 7(k) of the FLSA.

6. *Off Duty*

Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are *not* hours worked. For example, a forest firefighter on the fireline with a 12-hour alternating shift (12 hours on duty and 12 hours off duty) who is allowed to return to base camp after a 12-hour shift on duty and who is *not* scheduled for return to duty for a period sufficient enough to enable him to use the time effectively for his own purposes, is considered relieved from duty for this off duty period.

7. *Periods of Nonwork*

Only those hours that the employee is actually on duty during the tour of duty shall be included in hours worked

under the FLSA. Paid time off during the work period (holiday, annual leave, sick leave, or any excused absence with pay) shall *not* be included as hours worked.

D. *Computation of Overtime Pay Entitlement—FLSA*

1. *Computation of "Regular Rate"—FLSA*

An employee's regular rate of pay must first be determined in order to compute his overtime pay entitlement under the FLSA. Section 7(e) of the FLSA requires inclusion in the "regular rate" of "all remuneration for employment paid to, or on behalf of, the employee" except for certain specific exclusions. Premium pay on an annual basis for regularly scheduled standby duty (5 U.S.C. 5545(c)(1)) and premium pay on an annual basis for administratively uncontrollable work (5 U.S.C. 5545(c)(2)) do *not* qualify as statutory exclusions from the "regular rate" and therefore, they are included in computing an employee's total remuneration.

The employee's hourly "regular rate" is then determined by dividing the employee's total remuneration for employment in any work period by the total number of hours in the employee's tour of duty under the FLSA (all hours actually on duty including scheduled and unscheduled periods).

Regular Rate—Total Remuneration of the Work Period Tour of Duty

The regular rate of pay at which the employee is employed shall in no event be less than the statutory minimum specified under section 6 of the FLSA. (See attachment 3 to FPM Letter 551-1 for the appropriate minimum wage rates).

2. *Computation of Overtime Pay—FLSA*

Once an employee's hourly "regular rate" is determined, the employee is then entitled to additional compensation at a rate of one-half times the "regular rate" for each

hour the employee's tour of duty exceeds the maximum hours limitation of section 7(k) of the FLSA.

Additional—½ X Regular Rate X Number of Overtime Hours Compensation

*NOTE*: The employee's additional compensation for overtime work is computed at *one-half* times the "regular rate" and not *one and one-half* times the "regular rate" for all overtime hours under the FLSA. A simple explanation is that in computing an employee's total remuneration for the work period, the employee has already been compensated at 100 percent for all hours in his tour of duty. Therefore, once the employee's "regular rate" is computed, the employee is then entitled to additional compensation of 50 percent times his "regular rate" for those hours in excess of the maximum hours limitation of section 7(k) of the FLSA. This method of computing an employee's overtime entitlement under the FLSA results in the employee being compensated for overtime work at a rate of "one and one-half times the regular rate at which he is employed."

Supreme Court, U.S.
FILED
APR 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1369

# In the Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD A. LAFORTE AND RICKEY A. ROGERS,
PETITIONERS

*v.*

CONSTANCE HORNER, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, AND THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals properly determined that the formula established by the Civil Service Commission for determining overtime rates of pay for federal firefighters complies with the requirements of the Fair Labor Standards Act.

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1369

RICHARD A. LAFORTE AND RICKEY A. ROGERS,
PETITIONERS

*v.*

CONSTANCE HORNER, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, AND THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 833 F.2d 977. The opinion of the district court (Pet. App. 30a-37a) is unreported.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 29a) was entered on November 17, 1987. The court of appeals denied petitioners' suggestion for rehearing en banc on December 23, 1987. The petition for a writ of certiorari was filed on February 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The federal government, as employer, became subject to the Fair Labor Standards Act of 1938 (FLSA), 29

U.S.C. (& Supp. III) 201 *et seq.*, in 1974. With respect to most covered employees, the FLSA provides that an employee must be paid overtime for all hours of work in excess of 40 hours per week "at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. 207(a)(1). In recognition of the fact that firefighters typically do not work a 40-hour week but, rather, generally are required both to perform work and to remain at their duty stations on standby during their work shifts, Congress enacted a special overtime pay provision applicable to firefighters. Under that provision, 29 U.S.C. 207(k), firefighters receive FLSA overtime pay for the hours they are on duty in excess of 106 hours in a two-week period.[1]

Congress instructed the Civil Service Commission, predecessor to the Office of Personnel Management, to apply the FLSA in the federal sector consistently with its application by the Department of Labor in other sectors. H.R. Rep. 93-913, 93d Cong., 2d Sess. 28 (1974). In January 1975, the Commission issued Federal Personnel Manual (FPM) Letter No. 551-5 (Jan. 15, 1975) (excerpted at Pet. App. 52a-63a), which provided instructions for applying the FLSA to federal firefighters. Because FLSA overtime is to be paid at the rate of one and one-half times the "regular rate of pay," which the FLSA defines as "includ[ing] all remuneration for employment paid to, or on

[1] Section 207(k) directed the Secretary of Labor to perform a study to determine the average number of hours firefighters were on duty in 1975, and it provided that firefighters must receive overtime for duty hours in excess of the lesser of 216 hours per 28-day period or the number of duty hours determined by the Secretary's study. The Secretary found that firefighters averaged 212 hours of duty per 28-day period (48 Fed. Reg. 40518-40519 (1983)). As a result, federal firefighters are entitled to overtime pay for all hours that they are on duty in excess of 106 hours per two-week period.

behalf of, the employee" (29 U.S.C. 207(e)), it was necessary for the Commission to establish a formula for computing a firefighter's regular rate of pay. FPM Letter No. 551-5 instructed that a federal firefighter's regular rate of pay for a pay period is the General Schedule (GS) pay (basic pay) the firefighter received, plus certain standby duty pay received pursuant to 5 U.S.C. 5545(c)(1) (premium pay),[2] divided by the number of hours per work period that the firefighter is regularly on duty. After the regular rate is calculated, the amount of FLSA overtime pay due a firefighter is determined by multiplying one-half the regular rate times the number of FLSA overtime hours. An additional one-half is paid because " 'the employee has already been compensated a hundred percent for all hours in his tour of duty' " (Pet. App. 34a (quoting FPM Letter No. 551-5)). Thus, when paid half again, firefighters receive in total one and one-half times the regular rate for the hours they were on duty in excess of 106 during a two-week period.

Petitioners were federal firefighters in January 1984. At that time, they were regularly scheduled to be on duty for six 24-hour shifts, for a total of 144 hours, during each two-week work period. During a shift, petitioners worked for eight hours and were on standby for 16 hours. Pet. App. 2a. As they note (Pet. 6 n.3), they received $530.40 in basic pay and $132.80 in premium pay for each two-week period. Pursuant to the formula established by the Civil Service Commission, their regular rate of pay was $4.60 per hour (($530.40 basic pay + $132.80 premium pay)/144 hours). Because they regularly were scheduled for 38 hours of overtime duty (144 hours − 106 hours)

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[2] Federal firefighters receive premium pay pursuant to Section 5545(c)(1) because they are required to be on standby for substantial periods.

during a two-week period, they were entitled to $87.40 in FLSA overtime pay for that period (½ × $4.60 × 38 hours). Accordingly, they received $750.60 for each two-week period ($530.40 basic pay + $132.80 premium pay + $87.40 FLSA overtime pay). It is perhaps more intuitively understandable to view their total pay as representing approximately $488 for 106 hours at the regular rate of $4.60 and $262 for 38 hours of FLSA overtime at the rate of $6.90 (1½ × $4.60).[3]

2. Petitioners, who do not quarrel with the regular rate calculation set forth in FPM Letter No. 551-5, filed this suit contending that they are entitled to FLSA overtime pay in excess of the "half again" payment mandated by FPM Letter No. 551-5. They argue that under 5 U.S.C. 5504(b), which, until it was amended in 1986 (Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 15203, 100 Stat. 334), provided that "[f]or pay computation purposes affecting an employee, the annual rate of basic pay established by or under statute is deemed payment for employment during 52 basic administrative workweeks of 40 hours," their basic pay must be viewed as compensation for the first 80 hours of duty only. In the court below, they further argued that the premium pay received under Section 5545(c)(1) must be viewed as compensation for all 144 hours of duty. Thus, the court of appeals explained, under petitioners' approach, in each of the first 80 hours of duty during a two-week period a firefighter "would receive 1/80th of his basic GS pay for the 2-week period and 1/144th of his

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[3] For 106 hours at $4.60 per hour, petitioners would receive $487.60, and for 38 hours at $6.90 petitioners would receive $262.20, for a total of $749.80. The 80-cent difference between the total pay calculated in that manner and the total pay calculated by the formula in FPM Letter No. 551-5 is due to rounding the regular rate to $4.60.

premium pay for the 2-week period. For each of the next 26 hours, he would only receive 1/144th of his premium pay. Finally, for the last 38 hours, he would be deemed to receive 1/144th of his premium pay and sufficient additional pay to bring the total compensation for each of those 38 hours to equal his regular rate of pay times one and one-half." Pet. App. 8a n.4. Under that approach, petitioners were "underpaid for each of the last 38 hours of each 2-week work period by an amount equal to the difference between their regular rate of pay and 1/144th of their premium pay for the 2-week period" (*ibid.*).

The district court recognized that the Federal Circuit had upheld the calculation method set forth in FPM Letter No. 551-5 in *Zumerling* v. *Devine*, 769 F.2d 745 (1985), and accordingly entered judgment in favor of the government. In *Zumerling*, the court concluded, with respect to the regular rate calculation, that "it appears reasonable that the regular rate is to indicate the typical hourly wage paid, and OPM's equation merely reflects this fact" (*id.* at 751). It also rejected the contention that FPM Letter No. 551-5 conflicts with the statute because it provides that the amount of FLSA overtime pay should be calculated by multiplying half the regular rate times the number of overtime hours of duty, explaining that "[b]y receiving an additional one-half pay, the employee receives in total one and one-half times the regular rate at which he is employed" for overtime duty (*id.* at 752). The district court here further noted, with respect to petitioners' calculation method, that "it is illogical to find that basic pay for firefighters is only for 80 hours work and not for the total hours worked, that number being 144" (Pet. App. 35a). It dismissed petitioners' reliance on the sentence deleted in 1986 from Section 5504(b), noting that Section 5504(b) "was promulgated to enable employees to compute their annual rate of basic pay to a 'basic hourly, daily, weekly, or bi-

weekly rate' only and is not a factor in determining the 'regular rate' " (Pet. App. 36a).

The court of appeals affirmed (Pet. App. 1a-29a). It recognized, following *Zumerling*, that, contrary to petitioners, " 'employees receive their regular rate of pay for each of the 144 hours they work' " (*id.* at 10a (quoting 769 F.2d at 752)). It concluded that petitioners were attempting to read far too much into the sentence deleted from Section 5504(b), noting that the provision is "entitled 'Computation of Hourly Rates of Pay,' which appears to confirm that section 5504(b) was never intended to do anything more than provide a method to enable employees receiving annual pay to calculate a corresponding hourly, daily, or weekly rate" (Pet. App. 14a). In contrast to the "entirely reasonable" computation method set forth in FPM Letter No. 551-5, the court found "the computation formula proposed by appellants * * * to be confusing, to say the least, and perhaps unworkable" (*id.* at 13a). It concluded that the case represented "one more attempt by federal firefighters to gain a pay windfall through creative mathematics rather than from the intentions of Congress" (*id.* at 14a).[4]

## ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court

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[4] Senior Judge Bennett dissented. He did not agree (Pet. App. 27a) with petitioners' proposed calculation method. Rather, in his view firefighters' "basic pay should be considered payment only for the first 80 hours in each scheduled 144-hour work period and their premium pay properly should be considered payment only for the last 64 hours of each scheduled work period" (*id.* at 21a). Under that approach, "the proper offset for appellants' premium pay already received should be 1/64th of the premium pay, not 1/144th of it as urged by" petitioners (*id.* at 27a).

of appeals. This Court recently denied certiorari in an almost identical case.[5] Further review is not warranted.

1. As the Federal Circuit recognized in *Zumerling* and in this case, the method set forth in FPM Letter No. 551-5 for calculating the FLSA overtime pay due federal firefighters is correct. The proper starting point for determining how the FLSA affects federal firefighters is to calculate the firefighters' regular hourly rate of pay absent application of the FLSA. Dividing the total regular pay a firefighter would receive by the total number of hours for which that pay was received, as FPM Letter No. 551-5 requires, is a perfectly straightforward way of calculating a firefighter's regular hourly rate of pay. Giving the firefighter, in addition to his total regular pay, a further one-half of his hourly rate for each of his FLSA overtime hours plainly results in pay at the rate of one and one-half times the regular rate for those hours. The method devised by the Civil Service Commission thus accurately gives effect to Congress's purpose in applying the FLSA to the federal government. Under the calculation method set forth in FPM Letter No. 551-5, federal firefighters' pay is increased so that they are paid at the rate of one and one-

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[5] The petitioners in *Wheeler* v. *United States*, cert. denied, No. 86-1000 (Mar. 9, 1987), were also federal firefighters who challenged the calculation method for FLSA overtime pay established in FPM Letter No. 551-5. The Claims Court had rejected their contentions (9 Cl. Ct. 579 (1986)), which were very similar to petitioners' contentions, in light of *Zumerling*, and the Federal Circuit had summarily affirmed (No. 86-1043 (Sept. 18, 1986)). In addition, the plaintiffs in *Slugocki* v. *United States*, 816 F.2d 1572 (Fed. Cir. 1987), unsuccessfully challenged the calculation method established in FPM Letter No. 551-5 for federal law enforcement officers, who are treated similarly to federal firefighters under 29 U.S.C. 207(k), and this Court also denied their petition for a writ of certiorari (No. 87-361 (Dec. 7, 1987)).

during the half times the regular rate for the hours they are on duty in excess of 106 in a pay period.[6]

Petitioners' proposed calculation method, in contrast, does not accurately reflect the regular hourly wage earned by federal firefighters absent application of the FLSA, but instead artificially inflates their total pay by unreasonably allocating certain pay to certain hours. Petitioners' proposal, as explained by the court of appeals (Pet. App. 8a n.4), is to allocate firefighters' basic pay to the first 80 hours of duty during a two-week period and to allocate the premium pay received under 5 U.S.C. 5545(c)(1) to each of the 144 hours of regular duty. Under that approach, firefighters like petitioners would be deemed to have received $7.55 for each of their first 80 hours of work during a pay period (($530.40 (basic pay)/80 hours) + ($132.80 (premium pay)/144 hours)). Of course, they would not receive $7.55 per hour absent application of the FLSA, but instead would receive their regular rate, $4.60 per hour, for each of those hours of duty. Furthermore, under petitioners' calculation method firefighters would be deemed to receive only a fraction of their premium pay

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[6] The point can be illustrated by the example of an ordinary employee who worked 50 hours per week before the FLSA became applicable to him and who, after the FLSA became applicable, continued to work 50 hours per week, of which 40 hours are deemed (by the FLSA) to be regular time and ten hours are overtime. If the employee's pre-FLSA weekly salary was $200 per week, then he clearly was paid at the rate of $4 per hour. After application of the FLSA, he would have to be paid at the overtime rate of one and one-half times the regular rate for the hours worked in excess of 40 hours per week. Thus, after application of the FLSA, he would be paid $4 per hour for 40 hours and $6 per hour (1½ × $4) for 10 hours, for a total of $220. That could also be calculated, under the formula provided in FPM Letter No. 551-5, as the regular rate times the total number of hours worked ($4 per hour × 50 hours) plus one-half the regular rate times the number of FLSA overtime hours worked ($2 × 10 hours).

during the 26 hours of a pay period in excess of 80 hours during which, under 29 U.S.C. 207(k), firefighters do not receive FLSA overtime; during those 26 hours, under petitioners' method, they receive only 92 cents per hour ($132.80 (premium pay)/144 hours). Petitioners advance their confusing calculation method, despite the fact that it obviously distorts how firefighters are paid, because, under it, in addition to being owed half again their regular rate ($2.30) for each of their 38 hours of FLSA overtime during a pay period, they are also owed the difference between their regular rate of pay and 1/144th of their premium pay, or $3.68 per hour ($4.60 − $.92). Thus, under their method, they are owed an additional $139.84 ($3.68 × 38 hours) per pay period.[7]

Unlike petitioners' proposal, the calculation method set forth in FPM Letter No. 551-5 produces no distortions. Under FPM Letter No. 551-5, federal firefighters like petitioners are deemed to have received $4.60 per hour for each of their 144 hours of duty during a pay period, which

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[7] The calculation method proposed by the dissenting judge, while yielding less additional pay to petitioners than their method, also distorts the manner in which federal firefighters are paid. Under his proposal (Pet. App. 21a), firefighters are deemed to have received all of their basic pay (but only that pay) during the first 80 hours of a two-week period. Accordingly, they are paid $6.63 per hour ($530.40/80 hours) for those hours under his method, even though their regular rate is $4.60 per hour. Since, under the dissenting judge's method, Section 5545(c)(1) premium pay is allocated to the remaining 64 hours of duty during a pay period, under his method firefighters are deemed to have received $2.08 per hour ($132.80/64 hours) for the 26 hours in excess of 80 in a pay period for which FLSA overtime is not due under 29 U.S.C. 207(k). Under his method, petitioners are owed an additional $2.52 per hour (4.60-$2.08) for each of the last 38 hours of duty during every pay period, a total of $95.76 for the period.

is in fact what they would receive in the absence of 29 U.S.C. 207(k). Since Section 207(k) calls for them to receive one and one-half times their regular rate for their last 38 hours of duty, FPM Letter No. 551-5 properly provides that they should receive half again their regular rate for each of those hours. The formula set forth in FPM Letter No. 551-5 is plainly superior to the "confusing," "creative mathematics" proposed by petitioners (Pet. App. 13a, 14a).

The courts below correctly rejected petitioners' contention that the distortions their calculation method produces are mandated by the recently-deleted first sentence of 5 U.S.C. 5504(b). Unlike 29 U.S.C. 207(k), that provision does not apply specifically to firefighters but, as the lower courts explained, merely tells the bulk of federal employees how to calculate their hourly, daily, weekly, and biweekly rates. It simply has no role in defining the regular rate of pay under the FLSA. Moreover, the deletion of the sentence on which petitioners rely without comment in 1986 belies their contention that it had great significance.

Even if the calculation method set forth in FPM Letter No. 551-5 were not plainly correct, it would warrant deference as "a contemporaneous construction of [an] Act by the officials charged with the responsibility of setting its machinery in motion." *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 409-410 (1975); accord *United States* v. *Clark*, 454 U.S. 555, 565 (1982) (concerning the validity of a long-standing OPM regulation interpreting a federal pay statute); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (concerning the deference due to the interpretation of the FLSA by the statute's administrator). FPM Letter No. 551-5 is a comprehensive document, covering all aspects of the entitlements of federal firefighters to overtime pay under the FLSA, and it was issued at virtually the

same time that those employees became subject to the FLSA. The Federal Circuit recognized that OPM's predecessor gave careful consideration to the statutory objectives of providing fair and reasonable compensation to federal firefighters, concluding that "OPM's interpretive guidelines 'harmonize[] with the statute's "origin and purpose," ' " as well as with the Secretary of Labor's regulations. *Zumerling*, 769 F.2d at 750 (quoting *United States* v. *Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982)) (brackets added by quoting court). The Federal Circuit further noted in *Zumerling* (769 F.2d at 753) that "[b]y promulgating the guidelines at issue in this case, OPM has met the challenge given it by Congress. It has administered the FLSA in a most difficult situation and has done so consistent with the Secretary of Labor's regulations."[8]

2. Contrary to petitioners (Pet. 7, 11), nothing in *Bay Ridge Operating Co.* v. *Aaron,* 334 U.S. 446 (1948), or *United States* v. *Townsley,* 323 U.S. 557 (1945), neither of which involved overtime pay of federal firefighters pursuant to 29 U.S.C. 207(k), is contrary to the decisions below. The dispute in *Bay Ridge Operating Co.* concerned the calculation of the regular rate under the FLSA. The employers argued that the regular rate was the "straight time" rate paid employees for work between 8 a.m. and 5 p.m. on weekdays and 8 a.m. to 12 noon on Saturdays, without respect to any premium pay for work at different hours that the plaintiffs had received (334 U.S. at 451, 453). This Court determined that the regular rate was to be calculated by adding together all of the compensation paid to an employee during a workweek and dividing that sum

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[8] Because the Federal Circuit has exclusive jurisdiction to review claims brought under the Tucker Act (28 U.S.C. 1295(a)(2) and (3)), and claims by federal employees seeking back pay under the FLSA are almost always brought under that Act, that court has special expertise regarding such claims.

by the number of hours for which the compensation was paid (*id.* at 464), which is the manner in which the regular rates of federal firefighters are calculated. The Court went on to note that the Department of Labor had concluded that the employees were entitled "to an additional sum equal to the number of hours worked for one employer in a workweek in excess of forty, multiplied by one-half the regular rate of pay" and concluded that "[o]n the record before us, that interpretation seems to be a reasonable one" (*id.* at 476-477). The "half again" calculation method approved by the Court is precisely the same as the method set forth in FPM Letter No. 551-5.

This Court's decision in *Townsley* concerned employees affected by Section 23 of the Independent Offices Appropriation Act, 1935, ch. 102, 48 Stat. 522. The Court concluded that Congress's intention was to reduce the weekly hours of labor of those employees "to 40 without any pay cut" (323 U.S. at 568). Thus, when such an employee worked in excess of 40 hours in a week, he was to receive an additional one and one-half times his regular rate for the overtime hours (*id.* at 574). But here there is no indication in Section 207(k) or its legislative history that Congress intended to lower the number of hours federal firefighters were on duty while allowing them to continue to receive all the basic and premium pay they previously received.[9] Rather, Congress's intent was to provide that, for hours of duty in excess of 106 during a two-

[9] The plaintiffs in *Wheeler* v. *United States, supra*, argued that Congress intended to reduce the number of hours they worked so that their basic GS pay and Section 5545(c)(1) premium pay compensated them for the hours of duty during a pay period for which FLSA overtime did not have to be paid. That contention was rejected by the Claims Court (9 Cl. Ct. 579 (1986)), whose judgment was summarily affirmed by the Federal Circuit (No. 86-1043 (Sept. 18, 1986)), and renewed in the petition for a writ of certiorari that this Court denied (No. 86-1000 (Mar. 9, 1987)).

week period, federal firefighters would receive half again their regular rate.[10]

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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[10] Petitioners also claim (Pet. 10) that an unpublished opinion of the Comptroller General, which they have appended to their petition (Pet. App. 40a-50a), is in tension with the decisions below. The Comptroller General's opinion is of no direct relevance as the "computation of overtime under the FLSA" was not at issue (*id.* at 43a). It appears (*id.* at 41a) that the firefighters' union there argued (although the opinion is not particularly clear in this respect) that federal firefighters who are on duty for 144 hours during a two-week period are not compensated for their last 64 hours of duty and therefore should receive additional basic pay. The Comptroller General rejected that argument, noting (*id.* at 43a) that firefighters receive FLSA overtime for duty hours in excess of 106 during a two-week period and also noting (*id.* at 49a) that firefighters are compensated for the fact that they are on standby duty for substantial periods by premium pay under 5 U.S.C. 5545(c)(1). We do not understand anything in that opinion to conflict with the decision below; in any event, review by this Court would not be warranted to resolve a difference between a holding of a court of appeals and statements in an unpublished opinion of the Comptroller General.

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